In The

Supreme Court of the United States

October Term, 1977

No. 77-1548

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3,

Petitioner,

vs.

SIEBLER HEATING & AIR CONDITIONING, INC., INTERSTATE SHEET METAL, INC., DONOVAN BROTHERS, INC., SCHNEIDERWIND HEATING & AIR CONDITIONING CO., WALT COZIAHR HEATING & AIR CONDITIONING CO., FISHER HEATING & AIR CONDITIONING CO., NELSON HEATING & AIR CONDITIONING CO., ROBERTS SHEET METAL CO., and FRAZIER-SCHURKAMP, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

David D. Weinberg
Weinberg & Weinberg, P.C.
300 Keeline Building
Omaha, Nebraska 68102

Attorney for Petitioner.

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

Subject Index

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Statutes Involved 4

Statement of Case 4

Reasons for Granting the Writ:

1. The Decision of the Court of Appeals Conflicts With This Court's Decision in *Buffalo Linen*, 353 U. S. 87 11

2. The Decision Below Conflicts With the Decision of The Tenth Circuit Court of Appeals Which Held that an Employer May Not Withdraw From a Multi-Employer Bargaining Unit Merely Because Some Provision of a Proposed Agreement Would be Burdensome and Financially Ruinous..... 14

3. The Case Presents an Important Question of Federal Law Which Should Be Settled By This Court. 16

Conclusion 18

Index to Appendices

Appendix A. Decision of the Administrative Law Judge ..... App. 1

Appendix B. Decision and Order of the National Labor Relations Board ..... App. 38

TABLE OF CONTENTS—Continued

Pages

Appendix C. Supplemental Decision and Order of National Labor Relations Board ..... App. 41

Appendix D. Decision of the United States Court of Appeals for the Eighth Circuit ..... App. 44

Appendix E. Decision of the United States Court of Appeals for the Eighth Circuit for Rehearing En Banc ..... App. 57

Appendix F. Order of U. S. Supreme Court Extending Timee to File Petition for Writ of Certiorari ..... App. 58

TABLE OF AUTHORITIES CITED

CASES

Carvel Co. v. NLRB, 560 F. 2d 1030, 1035 (1st Cir., 1977) 12

Charles Bonanno Linen Service, 229 NLRB No. 108 (1971) 12

Connell Typesetting Co., 212 NLRB 918, 921 (1974) 12

Independent Ass'n. of Steel Fabricators, Inc., 231 NLRB No. 31 (1971) 12

NLRB v. Associates Shower Door Co., Inc., 512 F. 2d 230, 232 (C. A. 9, 1975), cert. denied 423 U. S. 893 15

NLRB v. Beck Engraving Co., 522 F. 2d 475 (3rd Cir. 1975) 12, 13

TABLE OF CONTENTS—Continued

Page

NLRB v. Central Plumbing Co., 492 F. 2d 1252, 1254 (C. A. 6, 1974) 14

NLRB v. Truck Drivers Union (Buffalo Linen), 353 U. S. 87, 96 (1957) 11, 12, 14

NLRB v. Tulsa Sheet Metal Works, Inc., 367 F. 2d 55, 57 (C. A. 10, 1966) 15, 16

NLRB v. Unelko Corp., 478 F. 2d 1040, 83 LRRM 2447 (7th Cir., 1973) 14

Retail Associates, Inc., 120 NLRB 388, 393, 395 (1958) 11, 12, 17

Spun-Jee Corp., 171 NLRB 557 (1968) 12

Vaca v. Sipes, 386 U. S. 171, 182 (1967) 13

RULE

Supreme Court Rules, Rule 19 2

STATUTES

Labor Management Relations Act of 1947, Sec. 8(a)(1), 29 U. S. C. Section 158(a)(1) 3, 4, 9, 12

Labor Management Relations Act of 1947, Sec. 8(a)(3), 29 U. S. C. Section 158(a)(3) 4, 9

Labor Management Relations Act of 1947, Sec. 8(a)(5), 29 U. S. C. Section 158(a)(5) 3, 4, 9, 12

United States Code, Title 28, Sec. 1254(1) 2

In The

Supreme Court of the United States

October Term, 1977

—o—

No. .....

—o—

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3,

Petitioner,

vs.

SIEBLER HEATING & AIR CONDITIONING, INC., INTERSTATE SHEET METAL, INC., DONOVAN BROTHERS, INC., SCHNEIDERWIND HEATING & AIR CONDITIONING CO., WALT COZIAHR HEATING & AIR CONDITIONING CO., FISHER HEATING & AIR CONDITIONING CO., NELSON HEATING & AIR CONDITIONING CO., ROBERTS SHEET METAL CO., and FRAZIER-SCHURKAMP, INC.,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit which denied enforcement of an order of the National Labor Relations Board (hereinafter "Board").

—o—

OPINIONS BELOW

The decision and recommended order of the administrative law judge is set forth in Appendix A hereto. The decision and order of the Board is set forth in Appendix B hereto. The supplemental decision and order of the Board is set forth in Appendix C hereto. The decision of a panel of the United States Court of Appeals for the Eighth Circuit which denied enforcement of the Board's order is set forth in Appendix D hereto and reported at 563 F. 2d 366. The decision of the Court of Appeals for the Eighth Circuit for Re-Hearing En Banc is set forth in Appendix E hereto. An order of the United States Supreme Court extending time to file petition for writ of certiorari is set forth at Appendix F hereto.

—o—

JURISDICTION

The original judgment of the Circuit Court of Appeals was entered on October 11, 1977 and the denial by the Court of Appeals of a Petition for Re-Hearing En Banc and Re-Hearing was made on November 30, 1977. On February 6, 1978 Petitioner filed an application for extension of time in which to file a Petition for Writ of Certiorari and on February 10, 1978 an order was issued by Honorable Harry A. Blackmun, Associate Justice of the Supreme Court of the United States extending time to file the petition until April 28, 1978.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1) and in accordance with Supreme Court Rule 19.

QUESTIONS PRESENTED

1. The Board's Retail Associates rule prohibits withdrawal from a multi-employer bargaining unit during contract negotiations (without mutual consent) except in "unusual circumstances". Did the Court of Appeals err in holding, despite the Board's explicit finding to the contrary, that a minority group of employers could withdraw from a multi-employer bargaining unit during contract negotiations under the "unusual circumstances" exception to the Retail Associates rule because their interests were not being "fairly represented" by their bargaining agent?

2. Is there a duty of fair representation imposed by statutory implication upon an employer collective bargaining agent, and, if so, would breach of such duty give an employer adversely affected thereby the right to repudiate a multi-employer bargaining commitment made by its employer bargaining agent to a union which had nothing to do with and was not responsible for the breach of the duty of fair representation?

3. Does a group of minority employers of a multi-employer bargaining unit violate Sections 8 (a) (1) and 8 (a) (5) of the Labor Management Relations Act, by making an untimely withdrawal, without the union's consent, from an established multi-employer bargaining unit, and by refusing to sign a contract negotiated with the union in that unit, because said agreement would be economically burdensome and genuine economic stress was only a step removed?

—o—

STATUTES INVOLVED

Section 8 (a) (1) of the Labor Management Relations Act of 1947, as amended (hereinafter "Act"), 29 U. S. C. Section 158 (a) (1) provides:

> "It shall be an unfair labor practice for an employer —to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title."

Section 8 (a) (3) of the Act, 29 U. S. C. Section 158 (a) (3) provides:

> "It shall be an unfair labor practice for an employer —by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. • • •"

Section 8 (a) (5) of the Act, 29 U. S. C. Section 158 (a) (5) provides:

> "It shall be an unfair labor practice for an employer —to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159 (a) of this title."

———o———

STATEMENT OF THE CASE

A. Background

The nine Respondents are located in the Greater Omaha, Nebraska-Council Bluffs, Iowa area where they are engaged as employers in the business of selling, installing and servicing heating and air conditioning systems and other related sheet metal work.

With the exception of Frazier-Schurkamp, the remaining eight Respondents had been members of Sheet Metal and Air Conditioning Contractors' National Association of Omaha-Council Bluffs (hereinafter referred to as "SMACNA") at all material times that the unfair labor practices they committed were alleged to have occurred. SMACNA exists for the purposes of representing its participating employer-members in collective bargaining, on an association-wide basis, with the Union, as to wages, hours and conditions of employment.

B. The 1974 Residential Addendum

In 1972 and 1973, respectively, SMACNA and the Union executed one-year contracts—each covering the period of July 1 through June 30 of the following year. The main difference between the two contracts was exhibited in a split wage rate provision on residential work that existed in the 1972 contract.

The Union, pursuant to its promise, subsequently formulated an addendum. A meeting was arranged in early February between the Union and SMACNA. Siebler was a representative of the employer association at that time. Siebler met with the Union Committee and SMACNA concerning the residential matter. A second meeting was held between the parties on February 14th. Changes were requested by Schurkamp and other employer representatives, which changes were agreed to by the Union. On February 19, SMACNA advised the Union of unanimous approval of the addendum. The Residential Addendum is for the period of April 1, 1974 through March 31, 1977. Siebler and Roberts, two of the Respond-

ents, signed copies of the addendum and transmitted them to the Union.

C. Reopening of the Contract by the Union and 1974 Negotiations

The Union reopened the 1973 contract with SMACNA. Arrangements were made between SMACNA and the Union to commence negotiations on April 2. Eight meetings were held in April and May to reach a new contract. Respondent Siebler was present with SMACNA negotiators during these meetings. Nothing was said at the first meeting by any of the Respondents about withdrawal from SMACNA, the first meeting being held April 2, 1974. Two other meetings were held on April 9 and 16 with Siebler in attendance. At these negotiation sessions nothing was said by any of the Respondents with regard to withdrawal from SMACNA. At the April 23 negotiation session, a letter was handed to the Union from the attorney for certain Respondents that they were terminating their relationship with SMACNA and withdrawing all authorizations from SMACNA to bargain for them. Six Respondents were involved in this withdrawal: Roberts, Siebler, Nelson, Coziahr, Interstate and Fisher. The Union, at this meeting, took the position that the six Respondents were still part of a multi-employer bargaining unit.

Frazier-Schurkamp informed the Union that this company was willing to meet with the Union independently or with the other group which had disassociated from SMACNA. Respondents Schneiderwind and Donovan also withdrew from SMACNA.

Respondents' attorney wrote the Union's attorney that the new group was willing to abide by the provisions of the contract already reached between SMACNA and the Union as of April 23 but requested discussion as to several different areas. The Union responded to this letter stating that several of the Respondents had signed and executed powers of attorney to SMACNA for the 1974 negotiations and that none of the Respondents had made timely or legal withdrawal from SMACNA; the Union stated its position that the eight Respondent Companies were bound by any agreements between SMACNA and the Union.

Final agreement was reached between SMACNA and the Union on May 14, 1974; the minutes of the negotiation and the final contract document were prepared and submitted to SMACNA and the individual members.

On June 3, 1974, the Union requested the nine Respondents (including Frazier-Schurkamp) in a letter to sign and execute a copy of the contract entered into between the Union and SMACNA. In this letter the Union again told the Respondents that they had not made a timely withdrawal from SMACNA. Thereafter the Respondents asked the Union to bargain with them as a new group.

On June 19, 1974, the nine Respondents distributed documents to workers to the effect that Respondents were willing to pay the wage increase in the SMACNA-Union agreement but wanted to meet regarding other provisions. Contained in these documents was the statement that unless the Union met and bargained with the new group represented by Jensen (Attorney for a newly

formed employer association of the Respondent) by July 1, all sheet metal workers represented by the Union would be locked out. On June 21 Siebler explained the document to employees and stated to employees that if the Union would not negotiate with the Respondents, there would be no work for sheet metal workers after July 1.

On July 1, 1974, the nine Respondents locked out sheet metal employees. A sign was placed in the Siebler shop when workers reported on July 1 that read: "No Negotiations—No Work. Effective July 1, 1974". The lockout lasted until July 10, 1974 when the Union received a telegram that due to weather conditions the nine Respondents were terminating the lockout. The telegram sent to the Union stated that the Respondents represented by Metropolitan Residential Contractors Association would not sign a contract negotiated by SMACNA, but were willing to negotiate a new contract. Again the Union informed the nine Respondents that they were bound by the contract with SMACNA. On July 10, 1974 the sheet metal workers returned to work.

When Frazier-Schurkamp sheet metal workers reported on July 10, 1974 they were informed that they would be paid the journeyman rate but that when they worked on residential buildings they would receive 75% of journeyman scale. On the same date, Siebler informed certain employees that their job classification would be Residential Installer with a wage rate of 75% of journeyman.

D. Board's Findings

The National Labor Relations Board on August 14, 1975 affirmed the rulings, findings and conclusions of the Administrative Law Judge and adopted his recommended order. In essence, the Administrative Law Judge concluded that by repudiating the agreement that SMACNA had made on their behalf in negotiations with the Union in said multi-employer bargaining unit and by untimely withdrawing from that multi-employer bargaining unit, Respondents have violated Sections 8 (a) (5) and (1) of the Act. A specific finding was made by the Administrative Law Judge, and concurred in by the Board, to the effect that no unusual circumstances existed to justify their otherwise untimely withdrawal from the multi-employer bargaining unit. In addition, the Administrative Law Judge concluded as follows: By threatening to lock out the employees represented by the Union, each of the Respondents has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and were in violation of Section 8 (a) (1) of the Act. By locking out the employees, represented by the Union, each of the Respondents has discriminated in regard to hire and tenure of employment of their employees, thereby discouraging membership in the Union in violation of Sections 8 (a) (3) and (1) of the Act. By unilaterally changing job classifications and reducing wage scales, Siebler, Frazier-Schurkamp and Nelson have engaged in and are engaging in unfair labor practices in violation of Sections 8 (a) (5) and (1) of the Act.

E. Decision of the Court of Appeals

The Court of Appeals refused to enforce the Board's order, however, holding that there were indeed unusual circumstances in the case that justified the residential employers' unilateral untimely withdrawal from the multi-employer bargaining unit. The Court of Appeals found that the refusal of SMACNA to engage in "tough bargaining to obtain a meaningful Residential Addendum", even though this decision was reached on the basis of a majority vote among the employer members of the multi-employer bargaining unit, was a breach by SMACNA of a duty—the source of which was never elucidated but presumably was some sort of federal statutory duty—to represent fairly the interests of all employers in the unit.[1] The Court then concluded that since SMACNA breached its duty to its own employer members, those disadvantaged employers were entitled to withdraw unilaterally from the multi-employer bargaining unit while negotiations were taking place.

---

1 The Court of Appeals made this finding despite the fact that the asserted economic necessity for a reduction in the residential rate was not shown to be so acute as to threaten the business survival of the residential employers.

—o—

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals conflicts with this Court's decision in Buffalo Linen, 353 U. S. 87.

The ruling of the Court of Appeals represents a judicial usurpation of the function of balancing the conflicting legitimate interests of employers and unions in multi-employer bargaining relationships, an activity that "the Congress committed primarily to the . . . Board, subject to limited judicial review." *NLRB v. Truck Drivers Union (Buffalo Linen)*, 353 U. S. 87, 96 (1957).

This Court in *Buffalo Linen* noted that when Congress enacted the Taft-Hartley amendments it expressly refused to approve further amendments that would have outlawed multi-employer bargaining because there was "cogent evidence" of its importance "in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining." (353 U. S. at 95). Thus "Congress intended 'that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.'" (353 U. S. at 96).

The Board for many years has looked with favor on multi-employer bargaining as a method of "promoting labor peace" and, to such end, it formulated the *Retail Associates* rule pursuant to which once negotiations have begun in an established multi-employer bargaining unit, none of the employers may withdraw from the unit with-

out the union's consent unless the withdrawal can be justified by unusual circumstances. *Retail Associates, Inc.*, 120 NLRB 388, 393, 395 (1958). The Retail Associates rule "is . . . intended to serve policy aims, stability in industrial relations and fairness in negotiations. . . . (It) is not familiar contract law but is a legitimate administrative rule in implementation of Section 8 (a) (1), (5) and (b) (3) in the context of multi-employer bargaining." *Carvel Co. v. NLRB*, 560 F. 2d 1030, 1035 (1st Cir., 1977).

The Board's niggardly exceptions to the Retail Associates rule for "unusual circumstances" have up to the present time been limited to (1) extreme financial hardship threatening the existence of the employer as a viable business entity. (*Spun-Jee Corp.*, 171 NLRB 557 (1968)), (2) fragmentation or dissipation of the multi-employer bargaining unit (*Connell Typesetting Co.*, 212 NLRB 918, 921 (1974)), and (3) possibly, a negotiating impasse, *NLRB v. Beck Engraving Co.*, 522 F. 2d 475 (3rd Cir. 1975), *Independent Ass'n. of Steel Fabricators, Inc.*, 231 NLRB No. 31 (1971) but see: *Charles Bonanno Linen Service*, 229 NLRB No. 108 (1971). With respect to the third category, the Third Circuit in *Beck Engraving* was most reluctant to disagree with the Board on the issue whether a bargaining impasse constituted "unusual circumstances" under the *Retail Associates* rule—the Board had held that it did not—and in footnote 15 (522 F. 2d at 484) indicated that it was well aware of the limitations placed on its power under the *Buffalo Linen* doctrine. The Court stated:

> "We reiterate that many of the ultimate policy judgments in this area should be made by the Board because of its expertise. We merely seek to redress an imbalance created by the Board's decisions and recognize that we cannot dictate to the Board the manner in which the balance should be achieved. In this regard, the Board may well decide that the impasse doctrine and the right of the union to negotiate individual, interim agreements form a part of a less desirable equilibrium than a return to the *Retail Associates* rule."

The Court of Appeals below in denying enforcement of the Board's order viewed the refusal by SMACNA to make an "all out" effort to obtain wage concessions desired by the residential employers as an eventuality so grave that as a consequence the residential employers were permitted to repudiate their commitment made by SMACNA, their duly authorized agent, to the union to negotiate on a multi-employer basis. This holding was rationalized as an extension of the duty of fair representation, which is applicable to bargaining unit employees and their representatives, to relations between employers and their bargaining agents. *Vaca v. Sipes*, 386 U. S. 171, 182 (1967).

If there is or ought to be a federally imposed duty of fair employer representation—and this is by no means clear—its extent and implications and the consequences of its breach should be carefully evaluated by the Board in the first instance. The Board ought to determine whether permitting the minority employers to withdraw from multi-employer bargaining for breach of such duty would be supportive of or inimical to stability of multi-employer bargaining units which, in turn, is "an essential ingredient of the Board's efforts to achieve peaceful labor relations." *NLRB v. Beck Engraving Co.*, supra at 480.

It is clear that the Board in the case below did not explore in depth the nature, extent, and consequences of this novel concept of a duty of fair employer representation and that the Court of Appeals, in violation of the *Buffalo Linen* holding, improperly arrogated the authority to create and apply by judicial pronouncement as a matter of first impression.[2] The Court of Appeals should have remanded the specific issue to the Board with instructions to give it full consideration and issue a supplemental decision setting forth its findings and conclusions with respect thereto.

2. The decision below conflicts with the decision of the Tenth Circuit Court of Appeals which held that an employer may not withdraw from a multi-employer bargaining unit merely because some provision of a proposed agreement would be burdensome and financially ruinous.

Untimely withdrawal by an employer or group of employers from negotiations in a multi-employer unit is not justified by the mere fact that an employer is "not happy with the results of the group bargaining". *NLRB v. Central Plumbing Co.*, 492 F. 2d 1252, 1254 (C. A. 6,

---

2 The Court of Appeals may have felt that it was following a precedent of sorts expressed in dicta in *NLRB v. Unelko Corp.*, 478 F. 2d 1040, 83 LRRM 2447 (7th Cir. 1973). The facts in *Unelko* were significantly different, however, involving the negotiation by a multi-employer bargaining agent of a discriminatory wage rate favoring four employers at the expense of all of the others, conduct bordering on fraud or bad faith. Even so, the Seventh Circuit held that the disadvantaged employer waited too long after discovery of the agent's improper representation to effect a timely withdrawal from multi-employer bargaining.

1974). As the Tenth Circuit stressed in *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F. 2d 55, 57 (C. A. 10, 1966):

> "To allow withdrawal from the multi-employer bargaining unit because negotiations are apprehended by one of the group members to be progressing toward an agreement which would be economically burdensome insofar as it is concerned, would be disruptive to the stability of the group collective bargaining process. As the trial examiner observed, '. . . some responsibility must rest upon the employer who invokes the advantages of group bargaining to assess and assume the responsibilities and limitations inherent therein.'"

If an employer were free to attempt to "secure the best of two worlds" (see *NLRB v. Associates Shower Door Co., Inc.*, 512 F. 2d 230, 232 (C. A. 9, 1975), cert. denied, 423 U. S. 893) by remaining in the multi-employer unit as long as he believed he could obtain advantageous terms through group negotiations and withdrawing as soon as he concluded he could achieve better terms through separate negotiations, the entire concept of stable multi-employer collective bargaining would be undermined.

The Eighth Circuit in its decision found that "genuine economic distress was only a step removed" as one ground for denial of enforcement of the Board's order. In *NLRB v. Tulsa Sheet Metal Works, Inc.*, supra, Respondent in that case urged that the Board should have given effect to its withdrawal from a multi-employer bargaining association because the wage scale then being seriously considered was excessively high with respect to its employees and it would be financially ruinous.

Thus, there is a conflict between the Eighth Circuit Court's decision and the Tenth Circuit Court's decision

in *NLRB v. Tulsa Sheet Metal Works, Inc.*, supra. In the Eighth Circuit Court's decision untimely withdrawal from a multi-employer bargaining unit under unusual circumstances was allowed because "economic distress was only a step removed". Whereas in the Tenth Circuit Court's decision untimely withdrawal from a multi-employer bargaining unit was not allowed even though the wage scale involved was excessively high and would be financially ruinous to the employer. It is submitted that this conflict should be resolved by this Court.

3. The case presents an important question of federal law which should be settled by this Court.

The Eighth Circuit recognized that multi-employer bargaining is a "vital factor or effectuating a national policy of promoting labor peace through strengthened labor bargaining". It then stated that multi-employer bargaining will work only when the interests of all parties to the bargaining are fairly represented.

The gist of the decision of the Court of Appeals is that a multi-employer bargaining unit established by agreement between a labor union and a group of employers may be fragmented during negotiations without the consent of the union because of a "falling-out" among the employer participants as to how much "tough bargaining" should be engaged in on issues of interest primarily to a minority within the employer group. If this proposition should be accepted, multi-employer bargaining relationships in general could be adversely affected for there always are divisive issues that could cause like rifts or fallings-out among the parties.

For instance, the quality of representation afforded by employer bargaining agents might, and probably would, be characterized by employers in multi-employer units who are bitterly disappointed with the final contract—and there often are a number of them—as arbitrary, capricious, or worse and, thus a breach of their duty of fair representation. The same observation might be made with respect to the tactics employed by the employed bargaining agent, i. e., to hold out against the union, to engage in a defensive lock-out or to accept terms that while not entirely satisfactory are at least tolerable to a majority of the employer clients, and preferable to self-held measures.

The *Retail Associates* rule recognizes as a fact of industrial life that a multi-employer bargaining agent in order to bargain effectively should have authority once the negotiations commence to deal with the employees bargaining representative on behalf of a fixed group of employers so as to be able to bind all of them to the bargain reached, subject perhaps to group ratification. Otherwise, multi-employer bargaining would lose much of its force as a stabilizing influence in industrial relations. The Court should make clear that a controversy between employers or between employers and their own bargaining agent is not a group for allowing the disaffected employers to withdraw from the multi-employer bargaining commitment made to the union, which is a bona-fide third party with respect to the internecine dispute.

———o———

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID D. WEINBERG

Attorney for Petitioner, Sheet Metal Workers' International Association, Local No. 3

APPENDIX A

JD-(SF)-53-75
Omaha, Neb.,
Elkhorn, Neb., and
Council Bluffs, Iowa

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case Nos. 17-CA-6104, 17-CA-6130, 17-CA-6145, 17-CA-6156, 17-CA-6194

SIEBLER HEATING & AIR CONDITIONING, INC.; INTERSTATE SHEET METAL, INC.; DONOVAN BROTHERS, INC.; SCHNEIDERWIND HEATING & AIR CONDITIONING CO.; WALT COZIAHR HEATING & AIR CONDITIONING, INC.; FISHER HEATING & AIR CONDITIONING CO.; NELSON HEATING & AIR CONDITIONING CO.; ROBERTS SHEET METAL CO.; FRAZIER-SCHURKAMP, INC.,[1]

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3,

Richard C. Auslander, of Kansas City, Kansas, for the General Counsel.

Soren S. Jensen, George C. Rozmarin and Glen A. Burbridge, of Omaha, Nebraska, for Respondents.

David D. Weinberg, of Omaha, Nebraska, for the Charging Party.

David R. Hols, of St. Paul, Minnesota, for the Intervenor, Sheet Metal and Air Conditioning Contractors National Association of Omaha-Council Bluffs.

---

1 Herein respectively called Siebler, Interstate, Donovan, Schneiderwind, Coziahr, Fisher, Nelson, Roberts and Frazier-Schurkamp, and collectively called Respondents.

DECISION

Statement of the Case

JAMES S. JENSON, Administrative Law Judge: These cases were tried before me in Omaha, Nebraska, on October 23 and 24, 1974. The complaints in 17-CA-6104 and 17-CA-6130 were issued on July 26, 1974,[2] and consolidated for hearing on July 29. The complaint in 17-CA-6104 alleges, in substance, that Siebler, Interstate, Donovan, Schneiderwind, Coziahr, Fisher, Nelson and Roberts untimely withdrew from multiemployer bargaining, and subsequently refused to sign the collective-bargaining agreement reached between Sheet Metal and Air Conditioning Contractors' National Association of Omaha-Council Bluffs, herein called SMACNA, the multiemployer association, and the Union in violation of Sections 8 (a) (1) and (5) of the Act. The complaint in 17-CA-6130 alleges, in substance, that following their untimely withdrawal from multiemployer bargaining, the eight Respondents in Case 17-CA-6104, together with Frazier-Schurkamp formed a new multiemployer association, Metropolitan Residential Contractors' Association, herein called Metropolitan, and threatened, and thereafter engaged in a lockout of their employees in order to force the Union to bargain collectively with Metropolitan, all in violation of Sections 8 (a) (1) and (3) of the Act. The complaints in Cases Nos. 17-CA-6145, 17-CA-6156 and 17-CA-6194 were issued on August 23, September 23 and September 24, respectively, and allege respectively that Siebler, Frazier-Schurkamp and Nelson each made unilateral changes in wage scales and job classifications of employees represented by the Union, in violation of Sections 8 (a) (1) and (5) of the Act. Respondents admit that on or about April 2, negotiations commenced on an agreement to replace the collective-bargaining agreement expiring on June 30, 1974; that on April 23 and 30, they notified the Union they were no longer represented by

2 All dates herein are 1974, unless otherwise stated.

SMACNA for the purposes of collective bargaining, and that they had formed Metropolitan through which they would bargain with the Union.[3] Respondents further admit that on June 19, they each notified the Union that unless it recognized and bargained with Metropolitan by July 1, they would engage in a lockout of their employees. They contend the lockout was lawful since the Union refused to bargain with Metropolitan. Respondents contend their withdrawals from SMACNA were "timely and effective for the reason that it was made at the time when it became apparent those in control of SMACNA had no intention to fairly and properly represent the Respondents, and that such conflict of interest and the malicious purpose of those controlling SMACNA was sufficient to constitute an 'unusual circumstance' justifying withdrawal." Nelson, Frazier-Schurkamp and Siebler, each contends that it was not obligated to obtain the approval of the Union for any changes in wage scales and job classifications since the Union had refused to meet and bargain with them either individually or through Metropolitan.

All parties were given full opportunity to appear, to introduce evidence, examine and cross-examine witnesses, to argue orally and to file briefs. Briefs were filed by the General Counsel, Respondents and the Union, and have been carefully considered.

Upon the entire record in the case,[4] and from my observation of the demeanor of the witnesses, I make the following:

3 Notice with respect to Siebler, Interstate, Coziahr, Fisher, Nelson and Roberts was given the Union on April 23; notice with respect to Schneiderwind and Donovan was given on April 30. Frazier-Schurkamp notified the Union on April 23, that it was willing to join the other Respondents in negotiations.

4 The General Counsel's motion to correct line 12 of page 208 of the transcript to read "$9.11" is granted.

Findings of Fact

I. Jurisdiction

Each of the Respondents is engaged in the heating, air conditioning and sheet metal business, and with the exception of Frazier-Schurkamp, has been a participating employer-member of SMACNA, a multiemployer association which exists, in part, for the purpose of representing its employer-members in collective bargaining on an association-wide basis. Each of the Respondents annually purchases materials and supplies valued in excess of $50,000 directly and/or indirectly from suppliers located outside the respective states in which their respective principal places of business are located. Upon these facts and the admissions of the Respondents, it is found that at all times material herein, SMACNA and each Respondent has been an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

II. The Labor Organization Involved

Sheet Metal Workers' International Association, Local No. 3, is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

Each of the Respondents is engaged in the heating, air conditioning and sheet metal business in the Omaha-Council Bluffs area. For a number of years prior to 1973, each of the Respondents has been represented in collective bargaining with the Union by SMACNA. In 1973, Frazier-Schurkamp withdrew from SMACNA and executed a contract on an individual employer basis. All other Respondents continued as members of SMACNA and authorized it to bargain on their behalf on a multiemployer basis. The 1972-1973 contract, to which all Respondents were a party, was effective from July 1, 1972 to June 30, 1973, and provided, *inter alia*, for a split wage rate for journeymen when they performed resi-

dential work.[5] The residential work provision was excluded from the 1973-1974 agreement upon the Union's assurance that it would make a study of the residential situation in the Omaha-Council Bluffs area and make a proposal which would make SMACNA members more competitive with nonunion shops in the area performing residential work.[6] Thereafter, Don Lahr, an international representative of the Union, went to Omaha to make the study and draft a new residential addendum. He met with SMACNA representatives, including Donald Siebler, president of Respondent Siebler. After discussing the problem at length, Lahr stated he would meet with the Union's executive committee and return with a proposal. On February 12, union representatives met with representatives of SMACNA, including Don Siebler, and presented their proposal. It was explained by the Union that the proposal, entitled "Residential Addendum," provided for a new "lower rate residential installer" classification that was to be paid a minimum of 75 percent of the journeyman rate; that employees in the new classification were to be obtained from the Union's hiring hall, and that the Union contemplated securing employees to fill the new job classification from nonunion shops in the area. It was further pointed out the employer would have the right to reject anyone referred as not qualified; that neither journeymen nor apprentices would suffer a reduction in wages or benefits or be replaced by a "lower rate residential installer"; and that in the event of a layoff, no "lower rate residential installers" would be hired until after both journeymen and apprentices shall have had an opportunity to be rehired in the same classification and

---

5 Journeymen received approximately 96 percent of journeymen scale when performing residential work, while apprentices continued to receive the apprentice scale on both residential and commercial work. It appears that residential work included work on single family dwellings, including apartments and condominiums.

6 The 1973-1974 agreement was signed August 20, 1973, effective July 1, 1973 to July 30, 1974.

rate of pay as before the layoff. The employer representatives agreed to take the proposal back to the membership.

On February 14, a second meeting was held between the parties. The employer representatives included Siebler and Richard Schurkamp of Respondent Frazier-Schurkamp. Schurkamp, on behalf of the employers, proposed two changes to which the Union agreed. The employer representatives then agreed to take the proposal back to the SMACNA membership. At the end of that meeting, Schurkamp informed a union representative "that Frazier-Schurkamp could agree with that addendum, that they could accept it." On February 18, the signatory contractor-members of SMACNA met, "a vote was taken and unanimous approval was given to the Residential Addendum."[7] The Union was notified on February 19. The Residential Addendum states that it "shall become effective on the 1st day of April 1974, and remain in force and effect until the 31st day of March 1977 . . ." Siebler and Roberts signed copies of the addendum on April 1 and 5, respectively.[8]

B. *Withdrawal From Established Multiemployer Bargaining*

The 1973-1974 collective-bargaining contract was effective until J ne 30, and from year to year thereafter unless reopened at least 90 days prior to the expiration date. Accordingly, on March 22, the Union notified SMACNA, its members and the independent contractors with whom it had agreements, that it wished "to renegotiate all Articles, Sections, Sub-Sections and *attached Addendums* contained in the present agreement which expires

7 Don Siebler made the motion to approve the addendum. Representatives of Schneiderwind, Donovan, Coziahr and Frazier-Schurkamp were also present.

8 While SMACNA was authorized to bargain on behalf of its employer-members, it was customary for the employer-members to attach their signatures to contracts.

June 30, 1974" (emphasis added).[9] By letter dated March 26, SMACNA notified the Union that its membership agreed "to the reopening" and proposed April 2 as the first meeting date. By letter dated March 29, the Union agreed to meet on April 2, "to exchange proposals and agree on ground rules for upcoming negotiations." The parties held eight negotiation meetings, on April 2, 9, 16 and 23, and May 1, 3, 7 and 14.[10] SMACNA's negotiating committee during the first three meetings consisted of Hooker, Siebler, Olson and Furey, the latter two being officials of two other employer-members of SMACNA. At the April 2 meeting, the parties agreed on the ground rules and exchanged proposals. The Union, noting that SMACNA was proposing to change the Residential Addendum, took the position that they had already reached agreement and that the Union was not willing to change it.[11] Between the April 2 and 9 meetings, Hooker prepared the "black book" which consisted of objectives the

9 Article XIII, Section 1, provides in part that "in the event such notice is served, this agreement shall continue in force and effect until conferences relating thereto have been terminated by either party."

10 Prior to both the reopening letter and to his signing the new Residential Addendum, Siebler discussed with Schurkamp whether the new Residential Addendum was workable. Siebler testified that he called Hooker, SMACNA's executive director, and another member of the negotiating committee, and determined that it was their opinion the new Residential Addendum was open for negotiation. He then requested that he be placed on SMACNA's negotiating committee.

11 As noted, *infra*, agreement had been reached in February on the Residential Addendum, providing for an effective date of April 1, 1974, until March 31, 1977, and Siebler had signed the addendum on April 1, the day prior to the first negotiating meeting. Bennard Preis, the Union's business manager, testified that the Residential Addendum had been negotiated early in the hopes that a fight could be avoided during the regular negotiations and to enable the employers to use the new residential installer wage scale in bidding for work in the forthcoming building season.

employers hoped to achieve during negotiations. One of those objectives was to negotiate a new residential addendum which would include as residential work, work on condominiums and apartments. Another objective was a service addendum permitting service work at 75 percent of journeymen scale. Neither item was discussed during the April 9 negotiating meeting. Following that meeting, the SMACNA labor committee went to dinner together. Siebler's testimony regarding the dinner conversation follows:

> A. I can recall at that meeting, I said that I would just as soon on June 30, and of course I am a layman, not a lawyer, so I may have been in error when I said this, but I said, on June 30, the termination of the contract, I would just as soon terminate the agreement and then the commercial contractors would sign their contract and the residential contractors would be off the hook and negotiate their own contract. And we had quite a healthy discussion about that.
>
> Q. Who entered into that discussion?
>
> A. Mr. Olson and I, primarily.
>
> Q. And what do you recall Mr. Olson saying in particular, if anything?
>
> A. He didn't agree with me. He thought we ought to stay united and I said "I can't see where we are going to solve anything together." And he wasn't sure we could but he wasn't sure we couldn't, either.
>
> Q. Did he make any particular statement that you recall with reference to the position of the organization?
>
> A. He made a statement to the fact that he was going to have to let the majority rule, whether or not it was for the good of the whole industry or not. That, necessarily, the opinion of the labor committee wouldn't be taken to the general membership as the opinion of the labor committee unless it was unanimous in the labor committee. In other words, a majority vote in the labor committee would not be presented to the general membership as an opinion.

On April 10, at a luncheon meeting of some of the SMACNA members regarding "the air conditioning code," the subject of negotiations was brought up.[12] After the others had left, the two Olsons, Hooker and Siebler discussed the prior night's negotiations. Siebler testified that ". . . Mr. Hooker posed the question to Mr. Milt Olson, what would you do to settle the contract now, and he said, I would give them 85 cents an hour now and just leave the contract as is and forget anything else. And, Don [Olson] said amen, or something to that effect, that he would go along with that. At that point, it appeared to me that our Residential Addendum and everything else was down the drain . . . if that was the attitude of the large commercial contractor, I felt the Residential Addendum and other things that were important in the contract were not going to get negotiated."

On an undisclosed date after April 10, Siebler informed Hooker and Don Olson that he was going to call an unofficial meeting of the contractors "and tell them my story, what I felt." Olson suggested they hold an "official meeting" instead and explain the negotiations to the membership. Accordingly, a meeting for that purpose was scheduled for April 22. In the meantime, Siebler attended the April 16 negotiating meeting as a member of the SMACNA negotiating committee. Neither the residential nor service addenda were discussed.

---

12 Precisely who was present is not clear from the testimony. It appears, however, that Mr. Burbridge, one of the attorneys representing the Respondents, Furey, the chairman of the SMACNA negotiating committee, Milt and Don Olson of Olson Bros., Inc., Hooker, Don Siebler and possibly some others attended.

There was a heavy turnout for the April 22 meeting of the SMACNA membership. Siebler presented, and Dick Schurkamp of Frazier-Schurkamp, seconded the following motion:

> That the Association adopt the following resolution which shall be binding on the Association at all times hereafter and which shall hereafter be irrevocable and not subject to change or amendment except by majority vote of all signatory members of the Association. At all times it should be the bargaining position of the Association through the Labor Committee that no collective bargaining agreement shall be agreed to or signed with Local No. 3 of the SMWIA which does not contain the following propositions without change or substitution. The following propositions are:
>
> Residential Addendum: 1. Delete all reference to the January 1974 Mokan Report, and 2. Include wording that would make the addendum cover condominiums and apartments.
>
> Service Addendum: That 75% of journeymen wages be paid on all service work.

Following "extensive discussion," a vote was taken. There were 4 votes in favor and 11 against the motion.[13] The minutes of the meeting disclose that "a motion was then made by Leonard Lewis and seconded by Milton Olson that the Negotiating Committee go on record to make every effort to secure a workable Residential Addendum. Motion carried."

On the following morning, Siebler called Soren Jensen, one of the Respondent's counsel, and ". . . various people that I talked to in February and March about the

13 Three of the four votes in favor of the motion were by Respondents—Coziahr, Siebler and Frazier-Schurkamp. One Respondent—Donovan—voted against the motion. Five of the Respondents were not in attendance.

Residential Addendum, and asked them if they . . . wanted to take some action on behalf of that Residential Addendum." He testified, "Most of them said yes, so from there we decided to do what we did, which was withdraw from the association . . . and hopefully negotiate a contract of our own."[14]

At the April 23 negotiating meeting, Union Representative Preis was handed the following letter:

> This is to advise you that the following employers formerly represented for collective bargaining with the Union by Sheet Metal and Air Conditioning Contractors National Association—Omaha-Co. Bluffs, Inc., no longer are represented by the aforesaid association for collective bargaining purposes:
>
> ROBERT'S SHEET METAL
>
> SIEBLER HEATING & AIR CONDITIONING
>
> NELSON HEATING & AIR CONDITIONING CO.
>
> WALT COZIAHR HEATING & AIR CONDITIONING, INC.
>
> INTERSTATE SHEET METAL, INC.
>
> FISHER HEATING & AIR CONDITIONING
>
> The undersigned is authorized to take this action on behalf of these employers and to represent them in all future negotiations with your Union. All further contact or correspondence in this regard should be directed to the undersigned or, in his absence, to George C. Rozmarin.
>
> The decision to terminate the relationship with the Association was made because of a failure on the

14 Siebler testified that he would not have resigned from SMACNA if the membership had adopted his motion at the April 22 meeting.

part of the Association to provide fair representation to the aforesaid employers.

The above-mentioned employers will continue to observe the provisions of the contract now in effect between your Union and SMACCNA, subject to any modifications which might be agreed upon or proposed at a subsequent negotiation meeting between these employers and your Union.

In addition, we are authorized to advise you that Frazier-Schurkamp Company is willing to associate with these employers and will be present and represented at a meeting between these employers and your Union when such a meeting can be arranged.

We would suggest that a meeting between the above-mentioned employers and your Union be arranged as quickly as possible, and we would be ready to meet with you in the late afternoon or evening of May 1 or May 3. For a meeting place we would propose the law offices of Swarr, May, Smith & Andersen, 3535 Harney Street, if this meets with your approval.

Very truly yours,
Soren S. Jensen

Preis responded that Roberts, Siebler, Nelson, Coziahr, Interstate and Fisher were a part of the multi-employer unit, and that the Union wanted to proceed with the negotiations. On April 25, Preis received the following letter from Mr. Burbridge, another attorney representing Respondents:

> You have previously received a letter dated April 23, 1974, expressing the willingness of Frazier-Schurkamp, Inc. to be a member of a bargaining group together with Robert's Sheet Metal, Siebler Heating & Air Conditioning, Nelson Heating & Air Conditioning Co., Walt Coziahr Heating & Air Conditioning, Inc., Interstate Sheet Metal, Inc., and Fisher Heating & Air Conditioning.

This letter will serve as confirmation of the fact that Frazier-Schurkamp, Inc. will not be bound by any agreement negotiated by SMACNA—Omaha-Council Bluffs, Inc. and will be happy to make arrangements for direct meetings with you with regard to negotiation of the independent contract either through the group outlined in the letter of April 23, 1974 or independently.

On April 30, Jensen sent the following telegram to the Union:

PLEASE BE ADVISED THAT SCHNEIDERWIND HEATING AND SHEET METAL AND DONOVAN BROTHERS HEATING AND COOLING HAVE WITHDRAWN FROM SMACNA FOR PURPOSES OF CORRECTIVE BARGAINING AND HAVE JOINED WITH THE EMPLOYERS PERFORMING RESIDENTIAL WORK LISTED IN OUR LETTER OF APRIL 23 AND WILL BARGAIN WITH YOUR ORGANIZATION UNDER THE TERMS SET FORTH IN THAT LETTER.

SOREN S JENZEN FOR SCHNEIDERWIND HEATING AND SHEET METAL AND DONOVAN BROTHERS HEATING AND COOLING

Failing to receive a response to the earlier letter, on May 3, Attorney Rozmarin wrote Union Attorney Weinberg to the effect that the Respondents were reaffirming the necessity to withdraw from SMACNA and offering to negotiate with the Union as a separate group on those points left unsettled as of April 22, at a time and place mutually convenient.

On May 9, Preis wrote Jensen to the effect that Roberts, Siebler, Nelson, Coziahr, Schneiderwind and Donovan had signed powers of attorney authorizing SMACNA to bargain on their behalf, and that Interstate and Fisher had been represented in negotiations by SMACNA, and that none of the eight employers had made a timely withdrawal from the association, and as a consequence, they were bound by the negotiations and any resulting agree-

ments, and that the Union ". . . will only negotiate and attempt to consummate an agreement with the contractors representative which is SMACNA."

SMACNA and the Union reached final agreement on May 14, on a collective-bargaining agreement effective July 1, 1974, through June 30, 1977. On May 23, Frazier-Schurkamp sent the Union a telegram advising that it and the residential contractors formerly represented by SMACNA were now represented by Metropolitan and that the Union should contact Jensen, as attorney for Metropolitan, to arrange a meeting. On June 3, Preis sent each of the Respondents a letter stating that an agreement had been reached between SMACNA and the Union, and that since they had not made timely withdrawal from association bargaining, the Union considered them bound by the new agreement. Copies of the new contract were enclosed for signature, with the admonition that failure to sign within a week after receipt would result in the Union taking the position that they had violated the Act.

C. *The Lockout*

On June 19, the following document was sent to the Union and each employee employed by the respective Respondents:

> TO: Local No. 3, Sheet Metal Workers' International Association and Members of the Union
>
> Almost seventy days prior to the expiration of the present collective bargaining agreement, the undersigned eight employers advised SMACNA and Local No. 3 that they no longer would be represented by SMACNA for collective bargaining purposes because of problems involving conflicts of interest and misrepresentation which existed in the SMACNA organization. The new group offered to meet with Local No. 3 in an attempt to work out a new agreement. It is usually considered that sixty days is sufficient time for negotiation of a new contract.

> To date, Local No. 3 has refused to respect its bargaining obligation and has refused even to meet in a preliminary way with the representatives of the Metropolitan Residential Contractors' Association.
>
> If we do not have the opportunity to meet and discuss our mutual problems, the only result is going to be confrontation and the likelihood of work stoppages, expensive lawsuits and polarization of the positions of both parties. Most members of the Union are familiar with the problems of protracted and expensive litigation as a result of the recently concluded lawsuit involving the pension.
>
> It is really a very simple matter . . . Local No. 3 should agree to meet with the representatives of the Metropolitan Residential Contractors' Association and bargain in good faith for the purpose of coming up with a new agreement. If the Union will agree to do this, all of the litigation, the unfair labor practice charges, and all of these problems, expenses and delays will be eliminated.
>
> Also, we've heard the statement made by employees in some of the shops that if there is no contract, there will be no work; or unless the contract is agreed to in full, only commercial work will be done by those who are members of the Union. The problem here is that the employers' group, which has been recently formed, must stick together and cannot allow any whipsawing by the Union or by SMACNA. We cannot afford the uncertainty caused by individual work stoppages.
>
> All this leads us to this unfortunate conclusion. Although there are now pending litigation and unfair labor practice charges before the National Labor Relations Board, these avenues do not provide real and lasting solution to the problems we now have. This solution will come only from good faith negotiations at the bargaining table.

In most situations, it is the Union who is complaining about refusal to meet or lack of good faith in negotiations. Here the Union refuses to meet with the employers' association.

Therefore, this is to advise you that unless Local No. 3 agrees to recognize, meet with, and bargain with representatives of the Metropolitan Residential Contractors' Association by July 1, 1974, effective on that date, and continuing until the Union agrees to meet with the representatives of the Association, there will be no work available for members of the bargaining unit. Emergency work and service calls will be handled by supervisory and management personnel.

If the Union agrees to meet with representatives of the Association, it would be most likely that members of the Association would agree to make any increases retroactive and effective to July 1, 1974.

We have not gone into all the causes and reasons for the position that we are taking here. Let it be said, however, that we are reluctant to take this step, but believe that it is the only reasonable solution at this time.

If the Union does not agree to meet with the employer, employees should remove all of their personal items from the shops on June 28 or June 29, whichever is their last day of work.

The following "clarification" was also sent to the Union and hand delivered to each employee:

CLARIFICATION

We, as a member of the Residential Contractors Association, are not opposed to the raise negotion by Local No. 3 and SMACA, and we'll give the same raise on July 1st. However, other conditions of the contractor cause problems with our non-union competitor. That is what we want to negotiate, and that is why we are demanding a meeting with Local No. 3.

On June 21, Don Siebler called a meeting of his employees and informed them that if the Union didn't recognize and bargain with Metropolitan, there would be a lockout on July 1. On July 1, all nine Respondents locked out their sheet metal employees. When Siebler's employees reported for work that morning a sign was posted on the shop door reading "No Negotiations, No Work, Effective July 1, 1974."

On July 9, Preis received the following telegram from Jensen:

EXTRAORDINARY WEATHER CONDITIONS REQUIRE THAT CUSTOMERS BE ACCOMMODATED. WORK STOPPAGE CALLED OFF EFFECTIVE IMMEDIATELY. WORK WILL BE AVAILABLE AT EMPLOYERS PLACES OF BUSINESS AT ONCE. EMPLOYERS WILL NOT SIGN AGREEMENT NEGOTIATED BY SMACNA. METROPOLITAN RESIDENTIAL CONTRACTORS ASSOCIATION STILL WILLING TO NEGOTIATE NEW CONTRACT. FURTHER ACTION IN SUPPORT OF OUR RIGHT TO RECOGNITION WILL BE FORTHCOMING AT LATER DATE.

Preis immediately forwarded the following telegram to each of the Respondents:

Sheet Metal Workers' International Association, Local No. 3 has received information that your company, effective immediately, has called off its lock-out of July 1, 1974, of employees represented by our union. Employees represented by our union are available for work upon the request of your company and have been ready, willing and able to work since July 1, 1974. The union's position is that you are bound by an agreement negotiated and executed by your collective bargaining agent, SMACA, and expect your company to abide by all terms and provisions of this agreement.

On July 10, the Sheet Metal Workers returned to work.

D. *Changes in Wage Scales and Job Classifications*

Upon reporting for work on July 10, Frazier-Schurcamp's journeymen sheet metal workers were informed that when they worked on commercial buildings they would be paid at the journeyman rate, and when they worked on residential buildings they would receive 75 percent of journeymen scale. Thereafter, when those employees worked on single family dwellings, duplexes, apartment houses and condominiums, all of which Frazier-Schurcamp classified as residential work, they received the "lower residential installer" rate of 75 percent of journeyman scale as set forth in the Residential Addendum.[15]

On July 10, Siebler's shop foremen handed journeymen sheet metal workers Blohm, Muth, Caudill and Doty the following notice: "Effective July 10, 1974, your job classification will be Residential Installers; therefore, your rate of pay is 75% of Commercial Journeymen." Thereafter, these four men received 75 percent of journeymen's wages for both residential and commercial work.

Gene Butterfield had been employed by Nelson as an apprentice sheet metal worker from 1971 to mid-April 1974, when he left because the work was slow, and thereafter commenced working for Siebler. On July 10, he learned that work had picked up at Nelson's, so instead of returning to Siebler, he went to Nelson's and talked to Larry Allen, Jr., Nelson's vice president. Allen told Butterfield that the Company had lost a lot of residential work and, if he put Butterfield back to work, which he wanted to think about, Butterfield would be paid at journeyman's rate for commercial work, and 75 percent of journeyman's rate for residential work.[16] Two days later, Allen called Butterfield to report for work. Thereafter, Butterfield received journeyman rate for commercial work and 75 percent of journeyman's rate when he did residential work.

---

15 Section 2 of the Residential Addendum provided, in pertinent part, that ". . . work covered by this Addendum shall be confined to Single Family houses only . . . ."

16 Butterfield attained journeyman status on July 1.

E. *Analysis*

1. *Case No. 17-CA-6104*

In *Retail Associates, Inc.*, 120 NLRB 388, the Board pointed out that ". . . mutual consent of the Union and employers involved is a basic ingredient supporting the appropriateness of a multi-employer bargaining unit, [and] the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multi-employer bargaining unit." The Board then set forth rules governing the withdrawal of an employer or union from multi-employer bargaining. The Board stated that prior to the beginning of negotiations, withdrawal could only be effected by an unequivocal written notice expressing a sincere intent to abandon, with relative permanency, the multi-employer unit, and to pursue negotiations on an individual employer basis. However, once negotiations had actually begun, withdrawal could only be effected on the basis of "mutual consent" or when "unusual circumstances" were present.

An essential element to be considered in determining if an employer is part of a multi-employer bargaining unit is whether the employer has indicated an intention to be bound by group rather than by individual action. *The Kroger Co.*, 148 NLRB 569, 573. And, a multi-employer unit is appropriate even where the association members have not specifically delegated to the association authority to represent them in collective bargaining, or given the association the power to execute final and binding agreements on their behalf, or where some of the contracts have not been signed by all of the group. *Krist Gradis, et al.*, 121 NLRB 601. It is evident, therefore, that the historical pattern of collective bargaining in the instant case warrants the conclusion that each of the eight Respondents in Case No. 17-CA-6104, intended to be bound by the results of group negotiation and that the appropriate unit for the purpose of collective bargaining consists of all sheet metal workers, including journeymen, appren-

tices, and apprentice trainees, employed by the participating employer-members of SMACNA, but excluding office clerical employees, guards and supervisors as defined in the Act. Having so found, I further find that each of the eight Respondents were parties to the 1973-1974 collective-bargaining agreement between the Union and SMACNA, and to the Residential Addendum which was unanimously approved by the SMACNA membership on February 18, and which is effective on its face from April 1, 1974 to March 31, 1977.

The next question to be considered is whether the Respondents effectively withdrew from the SMACNA multi-employer bargaining group.

The 1973-1974 collective-bargaining contract provided for a 90-day written notice of reopening. Timely notice was given by the Union on March 22, and negotiations commenced on April 2. As negotiations had commenced on the multi-employer basis, Respondents' withdrawal after April 2 could be effected only on the basis of "mutual consent" or when "unusual circumstances" were present. Clearly, the Union refused to consent to the withdrawal of any of the eight Respondents from the multi-employer bargaining. The Union contends the eight Respondents are bound by the contract reached between SMACNA and the Union on May 14. The eight Respondents contend there were "unusual circumstances" which warrant their withdrawal from the multi-employer unit. Those "unusual circumstances," argue the Respondents, are based upon an alleged breach of promise or trust by SMACNA representatives that a new Residential Addendum would be negotiated and deadlocked if necessary. They contend that authorizations for SMACNA to bargain on their behalf were based upon those assurances, and that it subsequently became evident that the leadership of SMACNA never had any intention to negotiate and deadlock if necessary on a new Residential Addendum. Hence, it is argued, the withdrawal of Respondents was based upon a breach of promise and the consequent conflict of interest between the majority commercial con-

tractors and the minority residential contractors. "All of this must be viewed," the Respondents contend, "against the background of the serious economic situation faced by Respondents. Nonunion contractors were obtaining increasing amounts of residential work, including multiple-family dwellings and service work . . . Respondents simply would have been unable to 'live' with a 3-year contract giving them no relief to enable them to be competitive."

The crux of this case is the "Residential Addendum." The Respondents, having negotiated a "Residential Addendum" in February with an effective date of April 1, 1974, until March 31, 1977, want out from under that agreement. The Union contends the "Residential Addendum" was negotiated early (1) in an effort to avoid a conflict which might later bog down negotiations on the balance of the contract and result in a strike, and (2) to afford the employers the benefit of using the new residential work rate in computing bids on work for the approaching building season. That the Respondents sought to reap the benefits of the new "Residential Addendum," by applying the lower residential worker wage rate is clear from the evidence in Cases Nos. 17-CA-6145, 6156 and 6194, discussed hereafter. One of the objectives, it appears, in seeking to void the April 1, 1974 to March 31, 1977 Residential Addendum and to negotiate another Residential Addendum, was to redefine "residential work" to include work on multiple dwelling single family units, i. e., apartments and condominiums."[17]

The evidence shows that Don Siebler had belonged to SMACNA since it had been organized, and had been president of the organization and on the board of directors for the past 5 years. Furthermore, he had been on

---

17 The new Residential Addendum provided that the lower residential installer rate applied only to work on single family houses and not to work on apartments and condominiums.

SMACNA's negotiating committee each year since 1969.[18] He participated in the negotiations which culminated in the "Residential Addendum," which he signed on April 1, and which clearly states in the body thereof that it is effective from April 1, 1974 until March 31, 1977.

Regarding the alleged breach of promise or trust alluded to by Respondents, Don Siebler testified as follows:

> I called Mr. Furey and Mr. Hooker and requested that they come out to my office and I would like to talk to them. Which they did. I—then we talked on the residential addendum to some extent and I got their opinion and their opinion was pretty much expressed as mine was, that it was open for negotiation, the residential addendum was. And then I requested that I be put on the labor committee and that I would give him a letter of authorization and would serve on the labor committee, if we had an understanding that we could negotiate the residential addendum, which, after that, Mr. Olson called me and we had lunch and I was put on the labor committee. And after that I signed the residential addendum and I gave them a letter of authorization.

Thus, it is seen that it was the "opinion" of all three men—Furey, an employer representative on the SMACNA negotiating committee, Hooker, the executive director of SMACNA, and Siebler—that the Residential Addendum negotiated in February and effective from April 1, 1974 until March 31, 1977, was open for negotiations. Whether in fact the recently executed Residential Addendum was susceptible to renegotiation at that time depended, of course, not upon the opinion or understanding among the SMACNA negotiating committee, but upon the consent of the parties to the Residential Addendum, one being the

---

18 He had been a member of the negotiating committee when the 1972 Residential and Service Addendum was negotiated, which covered apartments and condominiums.

Union. Neither Furey nor Hooker did any more than express an opinion, which appears to have coincided with that of Siebler; moreover, it is noted that none of the "Bargaining Agent Authorizations" executed by the Respondents contains any condition limiting the authority of SMACNA to bargain on their behalf with the Union. Moreover, while the record does not disclose the date Coziahr signed an authorization, Roberts and Donovan each signed authorizations on January 15, Schneiderwind on January 16, Siebler on March 7 and Nelson on March 19. Thus, it is clear that three of the Respondents had signed SMACNA authorizations long before Siebler became a member of the 1974 negotiating committee. Moreover, it was not shown that any Respondent, with the exception of Siebler, sought to limit the authorization. In these circumstances, I find that the Respondents have failed to establish a breach of promise or trust by SMACNA representatives, or that the SMACNA authorizations were based upon assurances which the leadership of SMACNA had no intention of fulfilling.

Citing *N. L. R. B. v. Unelco Corp.*, 83 LRRM 2447 (C. A. 7, 1973), Respondents contend the SMACNA negotiations involved a "significant conflict of interest within its membership . . . [and consequently] it is clear that Respondents had a right to withdraw from the negotiations after they had commenced. . . ." It is argued that "Respondents in good faith relied on assurances that their interests would be protected and authorized SMACNA, and therefore the majority membership, to bargain on their behalf. When it came to the Respondents' attention that the SMACNA leadership had no intention to fulfill these assurances, they in good faith raised the issue at the special meeting on April 22, 1974." The facts reveal, however, that the SMACNA membership was acutely aware of the interests of the residential contractors when, on April 22, they rejected Siebler's intransigent motion and voted instead "to make every effort to secure a workable Residential Addendum." This action on the part of the membership does not reveal a conflict of interest;

instead, it is an acknowledgment of the problem and shows a willingness to negotiate towards a satisfactory resolution of the problem.

The "conflict of interest" argument appears to be grounded in the fact the SMACNA membership is composed of both large commercial contractors, who allegedly control SMACNA, and smaller residential contractors, some of whom are Respondents. However, the record does not establish a "conflict of interest" like that found in the *Unelco* case. In *Unelco,* a supplemental agreement negotiated between the Union and four members of the Association provided for a lesser wage rate for employees of the four favored members of the Association. In those circumstances, the court concluded the employer could have withdrawn after multi-employer bargaining commenced, if it had acted promptly and decisively after it became aware of the posture of the negotiations.

Like the Trial Examiner in *Unelco,*[19] I find the instant case more akin to *N.L.R.B. v. Tulsa Sheet Metal Works, Inc.,* 367 F. 2d 55 (C. A. 10, 1966), where the court stated, at page 58: "However, to allow withdrawal from the multi-employer bargaining unit because negotiations are apprehended by one of the group members to be progressing toward an agreement which would be economically burdensome insofar as it is concerned, would be disruptive to the stability of the group collective-bargaining process. As the Trial Examiner observed, '. . . some responsibility must rest upon the employer who invokes the advantages of group bargaining to assess and assume the responsibilities and limitations inherent therein.' "

I conclude, therefore, that the Respondents have failed to establish "unusual circumstances" which would justify their untimely withdrawal from the multi-employer bargaining between SMACNA and the Union, and their refusal to accept the renewal contract. Such conduct violates Sections 8 (a) (5) and (1) of the Act. See, for example, *Hi-Way Billboards, Inc.,* 206 NLRB No. 1; *Central Plumbing Company,* 198 NLRB No. 135; *Retail Associates, Inc., supra.*

---

19 195 NLRB 236.

2. *Case No. 17-CA-6130*

I have previously found that the eight Respondents in Case No. 17-CA-6104 unlawfully withdrew from the SMACNA multi-employer bargaining unit on or about April 23. The General Counsel alleges, and the Respondents, including Frazier-Schurkamp, admit that Metropolitan was formed for the purpose of representing them in collective bargaining and that they each notified their employees and the Union that unless the Union bargained with Metropolitan, they would lock out their sheet metal workers on July 1. The evidence shows that when the Union declined to bargain with the new multi-employer association the nine Respondents in fact locked out their sheet metal employees from July 1 until July 10. The purpose of the lockout is clear—to force the Union to bargain collectively with Metropolitan as the representative of the Respondents.

Mutual consent of the Union and employers involved is a basic ingredient to multi-employer bargaining. Here, the Respondents have sought to withdraw, albeit unlawfully, from one multi-employer unit, and to form a new one. In the circumstances of this case, such action could be effected lawfully only with the consent of the Union in both instances. Consent was declined. The withdrawal from the established multi-employer bargaining unit being untimely and unlawful, it follows that the threat to engage in a lockout, and the attempt through coercive pressure on the employees to compel union acquiescence in the Respondent's unlawful restriction on the scope of bargaining violated Sections 8 (a) (1) and (3) of the Act respectively. An appropriate remedy will require each of the Respondents to reimburse their sheet metal workers for wages and benefits lost as a result of the unlawful lockout. See for example, *American Stores Packing Co., Acme Markets, Inc.,* 158 NLRB 620.

3. *Cases Nos. 17-CA-6145, 6156 and 6194*

The evidence establishes that each of the Respondents in these three cases were parties to the Residential Addendum reached between SMACNA and the Union in February. Accordingly, their conduct in unilaterally reclassifying their employees and reducing their wages without first bargaining with the Union constituted a refusal to bargain in violation of Section 8 (a) (5). *N. L. R. B. v. Benne Katz,* 369 U. S. 736; *Red Cab, Inc.,* 194 NLRB 279, 290; *Nelson-Hershfield Electronics,* 188 NLRB 26, 48. In addition to revoking said unilateral changes, it is appropriate that the Respondents be ordered to restore the affected employees to their appropriate classifications and to pay them the difference between the wages actually paid them and the amount they would have received had the unlawful unilateral reduction in wage rates not occurred. Such order shall include reimbursement for other benefits in accordance with the collective-bargaining agreement. *Cascade Employers Association, Inc.,* 126 NLRB 1014.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents, as set forth in Section III, above, occurring in connection with the operations of the Respondents and SMACNA as described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondents have engaged in, and are engaging in, certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

Conclusions of Law

1. Respondents and SMACNA, and each of them, are employers engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. All sheet metal workers, including journeymen, apprentices, and apprentice trainees, employed by participating employer-members of SMACNA, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. The Union is now, and at all times material herein has been, the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

5. The Union is now, and at all times material herein has been, the exclusive representative of all sheet metal workers (including journeymen, apprentices and apprentice trainees) employed by Frazier-Schurcamp, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

6. By repudiating the agreement that SMACNA had made on their behalf in negotiations with the Union in said multi-employer bargaining unit and by untimely withdrawing from that multi-employer bargaining unit, Respondents Siebler, Interstate, Donovan, Schneiderwind, Coziahr, Fisher, Nelson and Roberts have violated Section 8 (a) (5) and (1) of the Act.

7. By threatening to lock out the employees represented by the Union, each of the Respondents has inter-

fered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8 (a) (1) of the Act.

8. By locking out the employees represented by the Union, each of the Respondents has discriminated in regard to the hire and tenure of employment of their employees, thereby discouraging membership in the Union in violation of Sections 8 (a) (3) and (1) of the Act.

9. By unilaterally changing job classifications and reducing wage scales, Siebler, Frazier-Schurkamp and Nelson have engaged in and are engaging in unfair labor practices in violation of Sections 8 (a) (5) and (1) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:[20]

ORDER

A. Respondents Siebler, Interstate, Donovan, Schneiderwind, Coziahr, Fisher, Nelson and Roberts, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of Respondents' employees in the appropriate unit described above, with respect to wages, hours and other terms and conditions of employment.

---

20 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Refusing to acknowledge that they are bound by the terms of the collective-bargaining agreement between the Union and SMACNA effective July 1, 1974.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Bargain collectively with the Union by acknowledging that they are bound by the terms of the collective-bargaining agreement executed by the Union and SMACNA effective July 1, 1974.

B. Each of the aforementioned Respondents and Frazier-Schurkamp, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to lock out, or locking out, any of their respective employees in order to force the Union to bargain collectively with Metropolitan Residential Contractors' Association at a time when the Union is not lawfully bound to bargain collectively with said Association.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Make whole all the employees represented by the Union for any loss of pay they may have suffered as a result of the unlawful lockout from July 1 to July 10, and pay into the benefit funds provided for in the contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal lockout. Interest on said sums shall be computed at the rate of 6 percent per annum.

C. Respondents Siebler, Frazier-Schurkamp and Nelson, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with the Union as the representative of their employees, by effectuating unilateral changes in wage scales and classifications of employees.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Revoke the unilateral changes instituted on July 10, including the wage decreases and changes in job classifications, and restore to the affected employees their appropriate job classifications and wage scales.

(b) Make whole said employees for any loss of pay they may have suffered by reason of the unilateral changes in job classifications and wage scales, and pay into the benefit funds provided for in the contract, such sums as would have been paid into said funds on behalf of such employees, absent the illegal unilateral changes. Interest on said sums shall be computed at the rate of 6 percent per annum.

D. Each of the Respondents, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following further affirmative action which is necessary to effectuate the policies of the Act:

(a) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for determination of the amount of backpay due employees and the amount of the sums to be paid into the benefit funds provided for in the aforementioned contract.

(b) Post at their respective offices copies of the applicable notice attached hereto and marked Appendix 1 through 3.[21] Copies of said notices, to be furnished by the Regional Director for the Seventeenth Region, shall, after being duly signed by a representative of the respective Respondents, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all such places where notices to employees in the appropriate unit are customarily posted. Reasonable steps shall be taken by the respective Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Seventeenth Region, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated: March 26, 1975.

/s/ James S. Jenson
Administrative Law Judge

APPENDIX 1—JD-(SF)-53-75

(Seal) NOTICE TO EMPLOYEES (Seal)

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

We hereby notify you that:

WE WILL NOT refuse to bargain collectively with Sheet Metal Workers' International Association, Local No. 3, by

---

21 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

repudiating the agreement made on our behalf by the Sheet Metal and Air Conditioning Contractors' National Association of Omaha-Council Bluffs, Inc. in the following multi-employer bargaining unit:

> All sheet metal workers, including journeymen, apprentices, and apprentice trainees, employed by participating employer-members of SMACNA, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT withdraw from said multi-employer bargaining unit except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multi-employer negotiations; or except at such other time we may lawfully withdraw.

WE WILL honor and abide by any collective-bargaining contract executed by said Association on our behalf in said multi-employer bargaining unit.

WE WILL NOT threaten to lock out, or lock out any of our employees in order to force Sheet Metal Workers' International Association, Local No. 3, or any other labor organization, to bargain collectively with Metropolitan Residential Contractors' Association, at a time when we are lawfully bound by collective-bargaining negotiations between said Union and SMACNA.

WE WILL make whole all the employees represented by said Union for any loss of pay they have suffered as a result of our unlawful lockout.

WE WILL not in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed them by Section 7 of the Act.

Interstate Sheet Metal, Inc.

(Employer)

Dated ——— By ———
(Representative) (Title)

Donovan Brothers, Inc.

(Employer)

Dated ——— By ———
(Representative) (Title)

Schneiderwind Heating & Air Conditioning Co.

(Employer)

Dated ——— By ———
(Representative) (Title)

Walt Coziahr Heating & Air Conditioning, Inc.

(Employer)

Dated ——— By ———
(Representative) (Title)

Fisher Heating & Air Conditioning Co.

(Employer)

Dated ——— By ———
(Representative) (Title)

Roberts Sheet Metal Co.

(Employer)

Dated ——— By ———
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616 - Two Gateway Center, Fourth at State, Kansas City, Kansas 66101. Telephone Number: (816) 374-4588.

APPENDIX 2—JD-(SF)-53-75

NOTICE TO
(Seal) EMPLOYEES (Seal)

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

We hereby notify you that:

WE WILL NOT refuse to bargain collectively with Sheet Metal Workers' International Association, Local No. 3, by repudiating the agreement made on our behalf by the Sheet Metal and Air Conditioning Contractors' National Association of Omaha-Council Bluffs, Inc., in the following multi-employer bargaining unit:

> All sheet metal workers, including journeymen, apprentices, and apprentice trainees, employed by participating employer-members of SMACNA, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT withdraw from said multi-employer bargaining unit except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multi-employer negotiations; or except at such other time we may lawfully withdraw.

WE WILL honor and abide by any collective-bargaining contract executed by said Association on our behalf in said multi-employer bargaining unit.

WE WILL NOT threaten to lock out, or lock out any of our employees in order to force Sheet Metal Workers' International Association, Local No. 3, or any other labor organization, to bargain collectively with Metropolitan Residential Contractors' Association, at a time when we are lawfully bound by collective-bargaining negotiations between said Union and SMACNA.

WE WILL make whole all the employees represented by said Union for any loss of pay they have suffered as a result of our unlawful lockout including payment into the

benefit funds provided for in the contract such sums as would have been paid into said funds absent the illegal lockout.

WE WILL NOT change the job classifications or reduce the wage scales of any of our employees in the unit set forth above without first bargaining with the Union.

WE WILL revoke the unilateral changes in job classifications and wage scales which we instituted on or about July 1, 1974, and restore to the affected employees their appropriate job classifications and wage scales, and we will make them whole for any loss of pay they may have suffered as a result of the unilateral pay cut on July 1, 1974, including payment into the benefit funds provided for in the contract, such sums as would have been paid into said benefit funds on behalf of said employees had the unilateral changes not been made.

WE WILL not in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed them by Section 7 of the Act.

Siebler Heating & Air Conditioning, Inc.

_____
(Employer)

Dated ____ By _____
(Representative) (Title)

Nelson Heating & Air Conditioning Co.

_____
(Employer)

Dated ____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616 - Two Gateway Center, Fourth at State, Kansas City, Kansas 66101. Telephone Number: (816) 374-4588.

APPENDIX 3—JD-(SF)-53-75

(Seal) NOTICE TO EMPLOYEES (Seal)

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

We hereby notify you that:

WE WILL NOT refuse to bargain with Sheet Metal Workers' International Association, Local No. 3, as the exclusive representative of our employees in the following unit:

> All sheet metal workers, including journeymen, apprentices, and apprentice trainees, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT threaten to lock out, or lock out any of our employees in order to force Sheet Metal Workers' International Association, Local No. 3, or any other labor organization, to bargain collectively with Metropolitan Residential Contractors' Association, at a time when said labor organization is not lawfully bound to bargain collectively with said Association.

WE WILL make whole all the employees represented by said Union for any loss of pay they have suffered as a result of our unlawful lockout, including payment into the benefit funds provided for in the contract, such sums as would have been paid into said funds absent the illegal lockout.

WE WILL NOT change the job classifications or reduce the wage scales of any of our employees in the unit set forth above without first bargaining with the Union.

WE WILL revoke the unilateral changes in job classifications and wage scales which we instituted on or about July 1, 1974, and restore to the affected employees their appropriate job classifications and wage scales, and we

will make them whole for any loss of pay they may have suffered as a result of the unilateral pay cut on July 1, 1974, including payment into the benefit funds provided for in the contract, such sums as would have been paid into said benefit funds on behalf of said employees had the unilateral changes not been made.

WE WILL not in any like or related manner interefere with, restrain, or coerce employees in their rights guaranteed them by Section 7 of the Act.

Frazier-Schurkamp, Inc.

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 616 - Two Gateway Center, Fourth at State, Kansas City, Kansas 66101. Telephone Number: (816) 374-4588.

APPENDIX B

219 NLRB No. 180

FILE BB
Exec. Sec. 0

MJP

D—330
Omaha and
Elkhorn, Nebraska
Council Bluffs, Iowa

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIEBLER HEATING & AIR CONDITIONING, INC., *et al.*,[1]	Case 17—CA—6104
SIEBLER HEATING & AIR CONDITIONING, INC., *et al.*,[2]	Case 17—CA—6130
SIEBLER HEATING & AIR CONDITIONING, INC.,	Case 17—CA—6145
FRAZIER-SCHURKAMP, INC.,	Case 17—CA—6156
NELSON HEATING & AIR CONDITIONING CO.	Case 17—CA—6194

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3

---

1 Includes, in addition to Siebler, Interstate Sheet Metal, Inc.; Donovan Brothers, Inc.; Schneiderwind Heating & Air Conditioning Co.; Walt Coziahr Heating & Air Conditioning, Inc.; Fisher Heating & Air Conditioning Co.; Nelson Heating & Air Conditioning Co.; and Roberts Sheet Metal Co.

2 Includes Frazier-Schurkamp, Inc., in addition to those eight companies listed in fn. 1.

DECISION AND ORDER

On March 26, 1975, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

---

3 Inasmuch as Respondent Frazier-Schurkamp timely withdrew from SMACNA, it did not violate Sec. 8 (a) (1) and (5) of the Act in that respect, nor was it alleged or found. Nevertheless, we agree with the Administrative Law Judge that Frazier-Schurkamp did violate Sec. 8 (a) (1) and (3) of the Act by threatening a lockout of, and locking out, its employees in order to pressure the Union into bargaining with Respondent in a multiemployer unit for which the Union had not agreed to bargain. In this respect Frazier-Schurkamp authorized a newly formed multiemployer association, Metropolitan Residential Contractors Association, to bargain on its behalf and in a letter addressed to its employees it threatened a lockout unless the Union met and bargained with Metropolitan by July 1, 1974.

We also agree with the Administrative Law Judge that Respondents Siebler, Nelson, and Frazier-Schurkamp's change in the application of the residential wage rate without first bargaining with the Union violated Sec. 8 (a) (5).

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Siebler Heating & Air Conditioning, Inc.; Interstate Sheet Metal, Inc.; Donovan Brothers, Inc.; Schneiderwind Heating & Air Conditioning Co.; Walt Coziahr Heating & Air Conditioning, Inc.; Fisher Heating & Air Conditioning Co.; Nelson Heating & Air Conditioning Co.; Roberts Sheet Metal Co., and Frazier-Schurkamp, Inc., their offices, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D. C. Aug. 14, 1975.

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) National Labor Relations Board

APPENDIX C

File, Exec. Sec. O, E. M.

225 NLRB No. 152

MJP

D—1565
Omaha and
Elkhorn, Neb.
Council Bluffs, Iowa

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

SIEBLER HEATING & AIR CONDITIONING, INC., *et al.*[1]	Case 17—CA—6104
SIEBLER HEATING & AIR CONDITIONING, INC., *et al.*[2]	Case 17—CA—6130
SIEBLER HEATING & AIR CONDITIONING, INC.	Case 17—CA—6145
FRAZIER-SCHURKAMP, INC.	Case 17—CA—6156
NELSON HEATING & AIR CONDITIONING CO. and SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3	Case 17—CA—6194

1 Includes, in addition to Siebler, Interstate Sheet Metal, Inc.; Donovan Brothers, Inc.; Schneiderwind Heating & Air Conditioning Co.; Walt Coziahr Heating & Air Conditioning, Inc.; Fisher Heating & Air Conditioning Co.; Nelson Heating & Air Conditioning Co.; and Roberts Sheet Metal Co.

2 Includes Frazier-Schurkamp, Inc., in addition to those eight companies listed in fn. 1.

SUPPLEMENTAL DECISION AND ORDER

On August 14, 1975, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[3] which, *inter alia,* adopted the Administrative Law Judge's recommended Order that Respondents pay into the benefit funds[4] provided for in the collective-bargaining agreement between the Sheet Metal and Air Conditioning Contractors' National Association of Omaha-Council Bluffs, herein called SMACNA, and Charging Party, such sums as would have been paid on behalf of Respondents' employees absent the unlawful lockout from July 1 to 10, 1974, and absent the unlawful unilateral change in job classifications and wage rates.

On May 26, 1976, the General Counsel filed an unopposed motion for modification and clarification of the Board's Decision and Order. In his motion the General Counsel states that Respondents have taken the position that their obligations with respect to payments into the National Training Fund and the Local Training Fund were required only for the period of the unlawful lockout,[5] rather than for the duration of the contract term, and requests that the Board clarify its Order so as to provide

---

3 219 NLRB No. 180 (1975).

4 The contract provides that contributions shall be made into a National Training Fund and a Local Training Fund in addition to Health and Welfare and Pension Funds.

5 Specifically, the General Counsel states that Respondents have refused to comply fully with sec. B, 2, (a) and C, 2, (b) of the Order.

that Respondents are to make whole all benefit funds, including the National Training Fund and the Local Training Fund, for any payments improperly not made into them at any time since July 1, 1974, and during the term of the collective-bargaining agreement between Charging Party and SMACNA effective July 1, 1974.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the General Counsel's motion and concludes that it has merit. Accordingly, we shall grant the motion and clarify our Order, as requested.

ORDER

It is hereby ordered that Respondents make whole all benefit funds, including the National Training Fund and the Local Training Fund, for any payments improperly not made into them at any time since July 1, 1974, and during the term of the collective-bargaining agreement between Charging Party and SMACNA effective July 1, 1974.

Dated, Washington, D. C., Aug. 24, 1976.

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) National Labor Relations Board

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-2125

National Labor Relations Board,
Petitioner,

and

Sheet Metal Workers International Association,
Local No. 3,
Intervenor-Petitioner,

vs.

Siebler Heating & Air Conditioning, Inc., Interstate Sheet Metal, Inc., Donovan Brothers, Inc., Schneiderwind Heating & Air Conditioning Co., Walt Coziahr Heating & Air Conditioning Co., Fisher Heating & Air Conditioning Co., Nelson Heating & Air Conditioning Co., Roberts Sheet Metal Co., and Frazier-Schurkamp, Inc.,
Respondents.

On Application for Enforcement of an Order
of the National Labor Relations Board.

Submitted: June 15, 1977

Filed: October 11, 1977

Before GIBSON, Chief Judge, and HEANEY and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

The principal issue raised in this enforcement proceeding is whether the National Labor Relations Board's

finding that each respondent, other than Frazier-Schurkamp, violated § 8 (a) (5) and (1) of the National Labor Relations Act, as amended, 29 U. S. C. § 151 *et seq.*, by making an untimely withdrawal from a multi-employer bargaining unit, can be sustained. The resolution of this issue depends on whether unusual circumstances justified the respondents' withdrawal after negotiations had begun. The Board found that no unusual circumstances existed. We disagree with this conclusion and deny enforcement of the Board's order.

The essential facts are not disputed. The respondents are heating, air conditioning and sheet metal contractors concentrating on residential work. For a number of years prior to 1973, they were all members of the Sheet Metal and Air Conditioning Contractors' National Association of Omaha-Council Bluffs (SMACNA), a multi-employer association to which most of the area's contractors belong. During these years, SMACNA represented respondents along with its other members in multi-employer collective bargaining with the Sheet Metal Workers' International Association, Local No. 3. From 1969 to 1974, Don Siebler, a respondent, was president of SMACNA. He was also a member of its board of directors and its negotiating committee.

In 1972, SMACNA and the Union negotiated and executed a collective bargaining contract effective from July 1, 1972, to June 30, 1973. The contract included a so-called "Residential Addendum." It provided that journeymen sheet metal employees doing residential work would be paid ninety-six percent of the regular journey-

man rate. Residential work, as defined, included work on single-family dwellings, apartments and condominiums.

In 1973, Frazier-Schurkamp, one of the respondents, made a timely withdrawal from SMACNA. It then negotiated and executed a collective bargaining contract with the Union on a single-employer basis. All of the other respondents remained members of SMACNA. They authorized it to continue representing them in bargaining with the Union on a multi-employer basis. Thereafter, SMACNA and the Union negotiated and executed a new collective bargaining contract. It was to remain in effect from July 1, 1973, to June 30, 1974, and from year-to-year thereafter unless reopened by the parties. The 1973-1974 contract, unlike the 1972-1973 contract, did not include a Residential Addendum. The Addendum was omitted because the parties could not agree on its terms. However, the Union assured SMACNA that it would take a "long hard look at the residential situation in the Omaha-Council Bluffs area and try to work out something to make [respondents] more competitive with the non-union element in [the] area."

In January of 1974, a representative of the International Union came to Omaha to study residential contracting and to draft a new Residential Addendum. He discussed the problem with SMACNA representatives and then told them that he would meet with the Union's executive committee and return with a proposal for a new Addendum.

On February 12, 1974, the representative of the International met with SMACNA representatives, including Siebler, to discuss the proposed Residential Addendum.

The proposed Addendum established a lower rate for residential installers of seventy-five percent of the regular journeyman's rate. The rate would be applicable only to single-family dwellings. The Union stated that it would secure persons to work in this classification from non-union shops in the Omaha area and would refer such persons to employers through the Union hiring hall. The employers would have the right to reject anyone referred as unqualified. The Addendum provided that no existing journeyman or apprentices would be replaced by a lower-rated residential installer.

On February 14, the Union again met with SMACNA representatives. SMACNA suggested two minor changes to the proposed Addendum. The Union accepted them. The Addendum was subsequently approved by SMACNA's membership and was signed on April 1, 1974. It was effective, by its terms, from April 1, 1974, to March 31, 1977.

Between January 15 and March 19 of 1975, five of the respondents sent SMACNA signed letters authorizing SMACNA to represent them in renegotiating the 1973-1974 contract on a multi-employer basis. They agreed to be bound by any contract resulting from such negotiations.

On March 22, the Union gave SMACNA and each of the respondents timely notice that it wished to renegotiate the 1973-1974 contract. On March 26, SMACNA notified the Union that SMACNA's members agreed to such renegotiation. Shortly thereafter, SMACNA and the Union agreed to begin negotiations on April 2.

On April 1, Siebler met with SMACNA's leaders to discuss a revised Residential Addendum. Siebler stated that if there was an understanding that the recently negotiated Residential Addendum would be open for renegotiation, he would give SMACNA a bargaining authorization letter and would serve on SMACNA's negotiating committee. SMACNA leaders agreed to this condition. Siebler gave SMACNA a bargaining letter, accepted appointment to the negotiating committee and signed a copy of the new Addendum.

On April 2, SMACNA and the Union began renegotiating the 1973-1974 contract. SMACNA's negotiating committee included Siebler. During the session, SMACNA proposed that the existing Residential Addendum be renegotiated. The Union responded that it was not willing to change the recently negotiated Addendum.

Between April 2 and April 9, Robert Hooker, a SMACNA official, prepared a "black book" listing the objectives of SMACNA's negotiating committee. Included was an amended Residential Addendum extending the residential rate to condominiums and apartments and a Service Addendum extending the lower rate to service work.

On April 9, SMACNA and the Union held a second negotiating session. During the session, SMACNA did not propose the amended Residential Addendum or the Service Addendum. After the session, Siebler complained about this fact to SMACNA's negotiating committee. Siebler stated that he would rather terminate the existing contract so "the commercial contractors would sign their contract and the residential contractors would be off

the hook and negotiate their own contract." Don Olson responded that SMACNA's members should stay united. Siebler then protested that SMACNA's members could not solve anything together. Olson replied that he "wasn't sure [they] could and wasn't sure [they] couldn't." Finally, Olson stated that he would "let the majority rule" on the residential work issue.

On April 10, a luncheon meeting was held to consider an "air conditioning code." After that matter was discussed, a leader of the employers engaged in commercial and industrial work said he would give the Union "85 cents an hour now and just leave the contract as is and forget anything else." Other commercial and industrial contractors said, "Amen." Siebler was present when the statement was made.

On April 16, SMACNA and the Union held a third negotiating session. At this session, as at the April 9 session, SMACNA did not propose the amended Residential or Service Addendum.

On April 22, SMACNA's members met to consider the residential work issue. During the meeting, Siebler, seeking to firm up the respondents' position, introduced a resolution proposing that SMACNA sign no contract with the Union unless it contained "without change or substitution" two provisions: an amended Residential Addendum extending the existing Addendum's seventy-five percent wage rate to residential work on condominiums and apartments, and a Service Addendum extending the same seventy-five percent rate to service work. After extensive discussion, SMACNA's members rejected Siebler's reso-

lution and instead passed a resolution that SMACNA's negotiating committee "make every effort to secure a workable Residential Addendum."

On April 23, Siebler called several residential contractors and asked if they "wanted to take some action on behalf of that Residential Addendum." Most replied in the affirmative. Siebler and the others decided to withdraw from SMACNA and seek to negotiate a contract with the Union on their own.

On the same date, SMACNA and the Union held a fourth negotiating session. At this session, the Union was informed by letter that SMACNA no longer represented six of the residential contractors in collective bargaining because SMACNA had failed to provide them with fair representation. The Union was also informed that the six would observe the terms of the 1973-1974 contract until new contract terms were negotiated. They urged the Union to arrange negotiations with them as quickly as possible. The Union replied that the residential contractors were part of the established multi-employer bargaining unit and that the negotiations in that unit should proceed. The six were subsequently joined by three other contractors. All nine were named as respondents.

On May 5, the Union received a letter from certain of the respondents stating that they had withdrawn from SMACNA because "their interest in residential work was not being fairly protected by SMACNA" and they were willing to negotiate with the Union as a separate group.

In early May, SMACNA and the Union held four more negotiating sessions. On May 14, SMACNA and

the Union reached agreement on a new collective bargaining contract effective from July 1, 1974, through June 30, 1977.

On May 23, the respondents advised the Union that each residential contractor formerly represented by SMACNA was now represented by a new multi-employer association, Metropolitan Contractors Association. The Union was asked to meet with the association to negotiate a collective bargaining agreement. The respondents committed themselves to granting the same general wage increase as SMACNA.

On June 3, the Union sent each respondent a letter announcing that SMACNA and the Union had reached agreement on a new contract. Each letter included a copy of the contract. The letter asserted that the respondents did not make a timely withdrawal from the negotiations between SMACNA and the Union, and were, thus, bound by the new contract. The letter warned that if the respondents did not sign the contract within a week, the Union would consider them in violation of the Act.

On June 21, Siebler announced to his employees that if the Union did not negotiate with Metropolitan Contractors Association, there would be a lockout on July 1. In keeping with this announcement, each respondent locked out its sheet metal employees on that date.

On July 9, the respondents called off the lockout. They again stated that they would not sign the new contract negotiated with the Union by SMACNA. The same day, the Union advised them that the respondents' em-

ployees were willing to return to work. The Union repeated its position that the respondents were bound by the SMACNA contract.

On July 10, all of the respondents' sheet metal employees returned to work. Many were thereafter paid only seventy-five percent of the regular journeyman rate when doing any residential work on single-family dwellings, duplexes, condominiums or apartments.

On the basis of these facts, the Board found that a multi-employer bargaining unit existed and that negotiations for a new collective bargaining agreement were instituted prior to the respondents' attempt to withdraw from the unit. These findings are supported by substantial evidence on the record as a whole. The respondents do not challenge them. *See N. L. R. B. v. Truck Drivers Union,* 353 U. S. 87 (1957); *N. L. R. B. v. Central Plumbing Co.,* 492 F. 2d 1252 (6th Cir. 1974); *N. L. R. B. v. Tulsa Sheet Metal Work, Inc.,* 367 F. 2d 55 (10th Cir. 1966); *Retail Associates, Inc.,* 120 N. L. R. B. 388, 42 LRRM 1119 (1958).

The Board also found that no unusual circumstances existed to justify respondents' withdrawal when they did. In our judgment, the Board's findings cannot be sustained.

The record clearly shows that non-union contractors were taking an increasingly large share of all sheet metal work on residential properties. The respondents were anxious to solve this problem in a way that would permit them to retain a sufficient share of the available area work to continue in business. They were willing to work

with the Union to accomplish that purpose. The problem was not an easy one to solve. The Union wanted to retain the work for its members. It was, however, difficult to administer the program and maintain harmony within the Union because all Union members were more interested in working at the higher scale being paid to those who worked on commercial and industrial projects. Moreover, those who worked steadily at the higher wage level were not eager to make any sacrifices for their less fortunate brothers.

Various attempts were made to solve the problem within the framework of the multi-employer bargaining unit. The first effort to solve the problem in the 1972 agreement floundered on the shoals of employee dissatisfaction. The second effort, initiated in 1973 and formalized in early 1974, failed because the plan advanced by the Union did not provide relief for the respondents engaged in building apartments and condominiums. Non-union contractors continued to get those jobs.

The third effort was undertaken as the 1974 negotiations approached. The respondents agreed to participate in the collective bargaining agreement if SMACNA would work with them in achieving their goal of extending the seventy-five percent minimum wage rate for condominiums and apartments and to extend the wage rate to service work as well. SMACNA agreed to this goal and listed it as one of its objectives in the contract negotiations.

The negotiating committee raised the issue at the first meeting on April 2, 1974. However, it did not raise it at the second meeting on April 9, or at the third meeting on April 16. This failure, coupled with the April 10

statement by members of the negotiating committee representing commercial and industrial installers that they would settle for an eighty-five cents an hour increase and forget all other issues, made it crystal clear to the residential contractors that the majority was unwilling to engage in any tough bargaining to obtain a meaningful Residential Addendum. The plain implication was that the majority felt they might have to pay more than the eighty-five cents if they continued to insist on a better deal for respondents. Under these circumstances, the respondents had only two alternatives: withdraw promptly and decisively, which they did; or continue to lose business to non-union contractors or non-union employees.

We recognize that dissatisfaction with the results of group bargaining does not justify an untimely withdrawal. *N. L. R. B. v. Central Plumbing Co., supra; N. L. R. B. v. Tulsa Sheet Metal Works, Inc., supra.* We also understand that an employer cannot remain in a multi-employer unit as long as he believes it is to his advantage to do so and then withdraw when he concludes he can do better by himself. *N. L. R. B. v. Associated Shower Door Co., Inc.,* 512 F. 2d 230 (9th Cir.), *cert. denied* 423 U. S. 893 (1975). But an employer or group of employers has a right to expect that his or their interests will be fairly represented in negotiations and that their interests will not be totally sacrificed in the interests of the majority. Here, notwithstanding a commitment by the majority that the respondents' interests would be represented fairly, the majority made only a feeble effort to protect the respondents' interests and threw in the towel at the first sign of opposition. *See N. L. R. B. v. Unelko Corp.,* 478 F 2d 1404 (7th Cir. 1973).

Cf. Fairmont Foods Company v. N. L. R. B., 471 F. 2d 1170 (8th Cir. 1972); *Atlas Electrical Svc. Co.,* 176 N. L. R. B. No. 110, 71 LRRM 1625 (1969); *U. S. v. Lingerie Corp.,* 170 N. L. R. B. No. 77, 67 LRRM 1482 (1968) They did so because they believed their best interests would be served by giving an eighty-five cents per hour increase and leaving the remainder of the contract as is.

The Board makes much of the fact that the respondents insisted on an all or nothing solution to the problem by proposing a resolution to that effect at the April 22 SMACNA meeting. However, the record as a whole clearly shows that the resolution was intended only to stiffen the spine of the majority and to make the point that some sacrifice would have to be made by both commercial and industrial contractors if the multi-employer bargaining unit was to be maintained. The majority rejected this approach in favor of one which would provide the best contract for themselves.

The Board also emphasizes that a three-year Residential Addendum was negotiated in the Spring of 1974 and purported to bind the parties for three years. Ordinarily, this fact would be persuasive; but here, the majority agreed that the Addendum could be opened with the rest of the contract. While the Union protested that interpretation, it made no effort to have this issue submitted to arbitration. Moreover, the Board did not base its order on a clear finding that the Addendum was in fact binding for a three-year period.

The Board also claims that withdrawal was not justified here because the respondents' economic distress was not so severe as to threaten their economic survival.

While we do not view this as the principal grounds for withdrawal, the record reveals that non-union employers were getting a larger and larger share of the available residential work and genuine economic distress was only a step removed.

This Court recognizes that multi-employer bargaining is a vital factor in effectuating a national policy of promoting labor peace through strengthened labor bargaining. But multi-employer bargaining will work only when the interests of all parties to the bargaining are fairly represented. That was not done here.

Enforcement denied.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
September Term, 1977
76-2125

National Labor Relations Board,
Petitioner,
vs.
Siebler Heating & Air Conditioning, Inc., et al.,
Respondents.
Sheet Metal Workers' International Association, Local No. 3,
Intervenor-petitioner.

Application for Enforcement of Orders of the National Labor Relations Board

The Court having considered petition for rehearing en banc filed by counsel for petitioner and petition for rehearing en banc filed by counsel for intervenor Sheet Metal Workers International Association and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

November 30, 1977

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-668

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3,

Petitioner,

vs.

SIEBLER HEATING & AIR CONDITIONING, INC., ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 28, 1978.

/s/ Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 10th day of February, 1978.

I : The

Supreme Court of the United States

October Term, 1977

No. 77-1548

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3,

Petitioner,

vs.

SIEBLER HEATING & AIR CONDITIONING, INC., INTERSTATE SHEET METAL, INC., DONOVAN BROTHERS, INC., SCHNEIDERWIND HEATING & AIR CONDITIONING CO., WALT COZIAHR HEATING & AIR CONDITIONING CO., FISHER HEATING & AIR CONDITIONING CO., NELSON HEATING & AIR CONDITIONING CO., ROBERTS SHEET METAL CO., and FRAZIER-SCHURKAMP, INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SOREN S. JENSEN
GEORGE C. ROZMARIN
3535 Harney Street
Omaha, Nebraska 68131
Attorneys for Respondents

Of Counsel:
SWARR, MAY, SMITH & ANDERSEN
3535 Harney Street
Omaha, Nebraska 68131

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

	Pages
Statement of the Case	2
Reasons for Denying the Writ:	
1. The decision below is not in conflict with a decision of this Court.	2
2. The decision below is not in conflict with that of another United States Court of Appeals.	3
3. This case does not present an important question of federal law which should be settled by this Court.	3
Conclusion	4

CASES CITED

N. L. R. B. v. Truck Drivers Union, 353 U. S. 87 (1957)	2
N. L. R. B. v. Tulsa Sheet Metal Works, Inc., 367 F. 2d 55 (10th Cir. 1966)	3
N. L. R. B. v. Unelko Corp., 478 F. 2d 1404, 83 L. R. R. M. 2447 (7th Cir. 1973)	3
Retail Associates, Inc., 120 N. L. R. B 388 (1958)	2

In The

Supreme Court of the United States

October Term, 1977

No. 77-1548

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3,

Petitioner,

vs.

SIEBLER HEATING & AIR CONDITIONING, INC., INTERSTATE SHEET METAL, INC., DONOVAN BROTHERS, INC., SCHNEIDERWIND HEATING & AIR CONDITIONING CO., WALT COZIAHR HEATING & AIR CONDITIONING CO., FISHER HEATING & AIR CONDITIONING CO., NELSON HEATING & AIR CONDITIONING CO., ROBERTS SHEET METAL CO., and FRAZIER-SCHURKAMP, INC.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents pray that the Court deny the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in *National Labor Relations Board v. Siebler Heating & Air Conditioning, Inc., et al.*, 563 F. 2d 366 (8th Cir. 1977), on October 11, 1977.

STATEMENT OF THE CASE

Respondents will accept, for the purpose of the petition filed herein, Petitioner's Statements of Opinions Below, Jurisdiction, Questions Presented, and Statutes Involved, and would note to the Court that the National Labor Relations Board has not filed a petition for certiorari. Respondents would also, for the purpose of this petition, accept generally Petitioner's Statement of the Case, as supplemented by facts set forth in the circuit court's decision (A. 44).

———o———

REASONS FOR DENYING THE WRIT

1. The decision below is not in conflict with a decision of this Court.

Respondents submit there is no language in *N. L. R. B. v. Truck Drivers Union*, 353 U. S. 87 (1957), or any other decision of this Court, with which the circuit court's decision is in conflict. The circuit court's decision was an appropriate exercise of its judicial review function expressly recognized by this Court.

Petitioner suggests that the courts must defer to the Board general rules in this matter. The Board's rule in *Retail Associates, Inc.*, 120 N. L. R. B. 388 (1958), recognizes withdrawal for unusual circumstances. There were unusual circumstances present in this case.

2. The decision below is not in conflict with that of another United States Court of Appeals.

The circuit court expressly recognized the decision in *N. L. R. B. v. Tulsa Sheet Metal Works, Inc.*, 367 F. 2d 55 (10th Cir. 1966), and found it distinguishable. There were no circumstances in the Tenth Circuit case relating to the bargaining relationship between the employer group and its members.

On the other hand, the circuit court found support for its decision in the Seventh Circuit decision, *N. L. R. B. v. Unelko Corp.*, 478 F. 2d 1404, 83 L. R. R. M. 2447 (7th Cir. 1973), as well as in prior Board decisions cited (A. 54-55).

3. This case does not present an important question of federal law which should be settled by this Court.

The circuit court was careful to note that it recognized the importance of multi-employer bargaining (A. 56). It has not eroded the concept. This was simply a case in which the circuit court found the Board's finding of no unusual circumstances in error. The Board itself has not sought review of that decision.

The circuit court's decision is not contrary to national labor policy and raises no issue significant enough to justify a grant of the writ.

———o———

CONCLUSION

Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

SOREN S. JENSEN
GEORGE C. ROZMARIN
Attorneys for Respondents

Of Counsel:
SWARR, MAY, SMITH & ANDERSEN
3535 Harney Street
Omaha, Nebraska 68131
(402) 341-5421

No. 77-1548

In the Supreme Court of the United States

OCTOBER TERM, 1977

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3, PETITIONER

v.

SIEBLER HEATING & AIR CONDITIONING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1548

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 3, PETITIONER

v.

SIEBLER HEATING & AIR CONDITIONING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. Respondents are a group of nine companies in the Omaha, Nebraska, area specializing in residential air conditioning and sheet metal work. Until 1974, eight of the companies were members of a multi-employer bargaining association of similar companies in the Omaha area, although a majority of the companies in the association specialized in commercial rather than residential work (Pet. App. 4, 20-21, 45-46).

In 1974, during the course of negotiations between petitioner and the multi-employer bargaining association, the eight respondent members withdrew from the association and refused to be bound by any collective-bargaining agreement reached by petitioner and the

association.[1] Petitioner filed charges with the National Labor Relations Board, alleging that the respondents' withdrawal from the association in the midst of bargaining and their subsequent conduct constituted unfair labor practices (Pet. App. 4-14).

The respondents contended that their withdrawal from the multi-employer bargaining association was justified by "unusual circumstances" because, according to respondents, the association had made a commitment to seek a favorable differential wage scale for residential as opposed to commercial work, and it had breached that commitment (Pet. App. 20-21). The Administrative Law Judge, whose decision was adopted by the Board, rejected this defense, finding that no such commitment had been made and that respondents had not been treated unfairly by the multi-employer bargaining association (Pet. App. 23-24). Accordingly, the Board found that eight of the respondents violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (as amended, 61 Stat. 140, 141, 29 U.S.C. 158(a)(1) and 158(a)(5)) by making an untimely withdrawal from the multi-employer bargaining unit (Pet. App. 24-25). The Board also found that each of the respondents violated Sections 8(a)(1) and 8(a)(3) of the Act by locking out employees when petitioner did not negotiate with a new multi-employer bargaining association (Pet. App. 25). Finally, the Board found that three of the respondents violated Sections 8(a)(1) and 8(a)(5) of the Act by unilaterally changing employees' job classifications and reducing employees' wage rates (Pet. App. 26).

2. The court of appeals denied enforcement of the Board's order. The court apparently agreed with the legal propositions that underlay the Board's analysis—that

[1]The ninth respondent, Frazier-Schurkamp, Inc., had been a member of the association, but it withdrew in 1973 (Pet. App. 4, 46).

dissatisfaction with the results of group bargaining does not justify an untimely withdrawal, and that an employer "cannot remain in a multi-employer unit as long as he believes it is to his advantage to do so and then withdraw when he concludes he can do better by himself" (Pet. App. 54).[2] Assessing the facts differently from the Board, however, the court of appeals concluded that the multi-employer bargaining association abrogated a commitment to the respondent residential contractors to seek a more favorable residential wage rate in the 1974 bargaining negotiations (Pet. App. 53). This broken commitment, the court held, constituted "unusual circumstances" sufficient to justify the respondents' withdrawal from the multi-employer unit. The court explained that in its view the majority commercial contractors had acted in their own interests and had not represented the respondent residential contractors fairly. According to the court, "the majority made only a feeble effort to protect the respondents' interests and threw in the towel at the first sign of opposition" (Pet. App. 54).[3]

[2]These propositions are well established in both Board and court precedents. In *Retail Associates, Inc.*, 120 N.L.R.B. 388, 393-395, the Board held that, once negotiations in an established multi-employer bargaining unit have begun, none of the employers in the unit may withdraw from those negotiations without the union's consent, unless the untimely withdrawal is justified by unusual circumstances. See also *National Labor Relations Board* v. *Central Plumbing Co.*, 492 F. 2d 1252, 1254 (C.A. 6); *National Labor Relations Board* v. *Johnson Sheet Metal, Inc.*, 442 F. 2d 1056, 1059 (C.A. 10); *National Labor Relations Board* v. *Dover Tavern Owners' Association*, 412 F. 2d 725, 728 (C.A. 3); *National Labor Relations Board* v. *John J. Corbett Press, Inc.*, 401 F. 2d 673, 675 (C.A. 2).

[3]The Board has held that genuine economic distress may privilege withdrawal from a multi-employer bargaining unit. See, *e.g.*, *Atlas Electrical Service Co.*, 176 N.L.R.B. 827, 830; *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558; *U.S. Lingerie Corp.*, 170 N.L.R.B. 750, 751. The Board agrees with petitioner that on the record here respondents did not establish that such distress would result if they remained in the

3. The Board believes that substantial evidence supports its findings that the multi-employer bargaining association did not breach any commitment to respondents or fail fairly to represent the respondents' interests in the negotiations with petitioner. The Board did not file its own petition for certiorari, however, because, in the Board's view, the court of appeals' contrary conclusion presents only an evidentiary issue, which does not ordinarily warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490. Should the Court grant the petition, however, the Board will defend it order.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

JUNE 1978.

---

multi-employer unit. The Board, however, does not read the court of appeals' decision as holding that respondents' economic circumstances would have privileged their withdrawal here even if the multi-employer bargaining association had not breached a specific promise concerning the negotiation of wage rates. See Pet. App. 55-56.

DOJ-1978-06